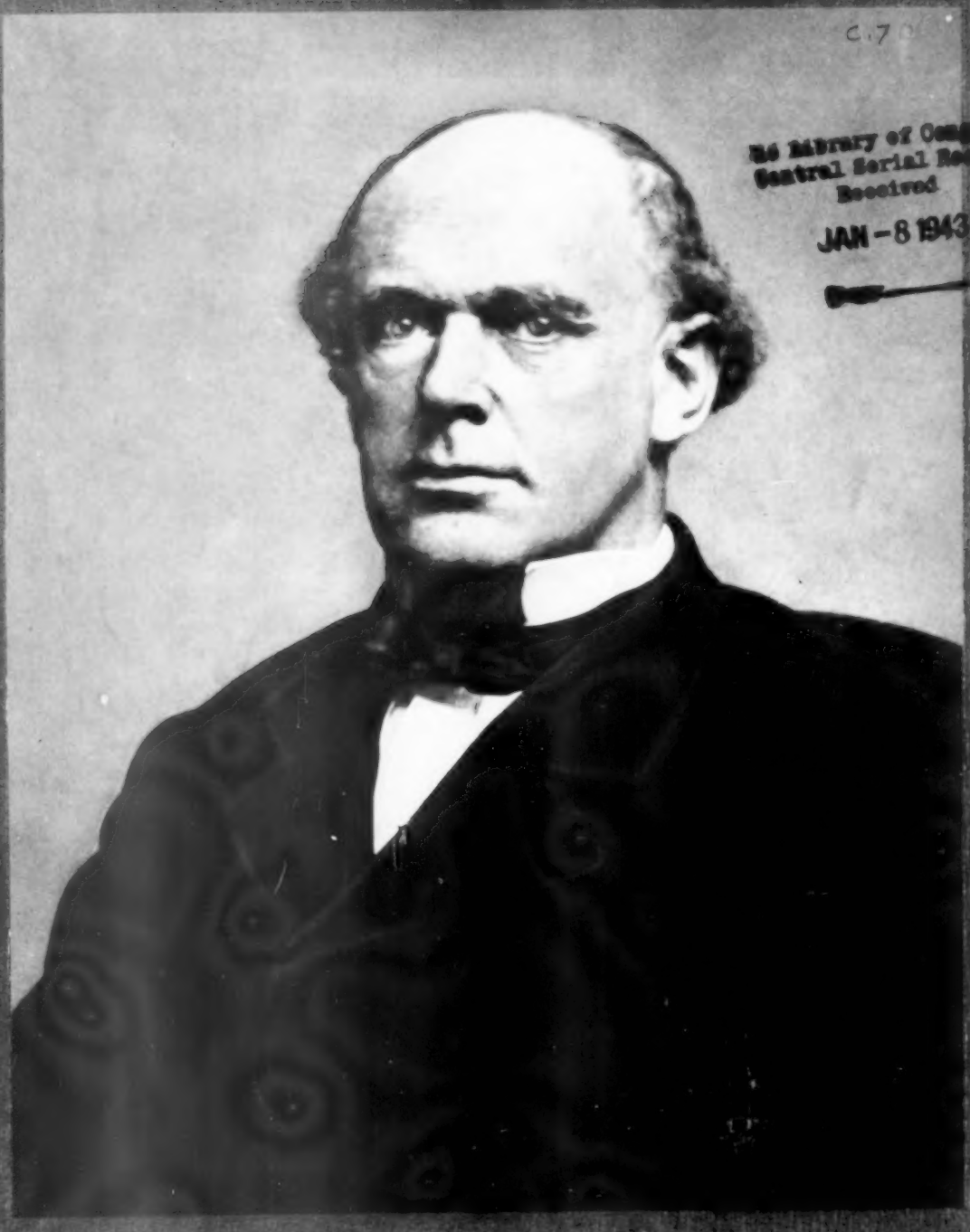

SALMON P. CHASE

AMERICAN BAR ASSOCIATION JOVRNAL

September 1941

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Our Cover. Salmon P. Chase, whose likeness appears on the cover of this issue, was the sixth Chief Justice of the United States. He had been Senator of the United States from Ohio, 1849 to 1855; was Governor of Ohio from 1856 to 1860; and was elected U. S. Senator in 1860 but resigned. He was Secretary of the Treasury from 1861 to 1864. President Lincoln appointed him Chief Justice to succeed Taney. He was appointed December 6, 1864, and was confirmed by the Senate the same day. He served as Chief Justice for something over ten years, until his death May 7, 1873. Lincoln once said of him:

> Chase is about one and a half times bigger than any other man I ever knew.

There are numerous likenesses of Chase extant due to the fact that photography had come into its own during his lifetime. Our cover is a reproduction of an original Brady photograph of Chase, furnished by Handy Studios, Washington, D. C.

Dialectics and the Law of Evidence. Professor Morgan in his article in this issue suggests that some of the anachronistic devices of the Law of Evidence have disappeared, but that "it is time for radical reformation" in that field of the law. Wigmore, to whom Morgan refers with implicit praise, has recently (1940) put out his final ten volume Third Edition of The Law of Evidence. In the Preface to the last edition Wigmore speaks of the Law of Evidence as being "forward-looking" now in contrast to the period when his Second Edition appeared.

Every modern lawyer and every judge has silently rebelled against the "anachronisms" of the Law of Evidence. As Professor Morgan points out, the rules of evidence of common law have "become so complicated as to invite comparison with those of equity pleading of which Story wrote that the ability to understand and apply them 'requires various talents, vast learning, and a clearness and acuteness of perception, which belong only to very gifted minds.' "

The tendency toward a modern restatement of the Law of Evidence will receive the commendation of all lawyers. Many of the rules of evidence of common law grew up during the reign of "scholastic logic" when Dialectics was regarded as a major branch of learning. Cardinal Newman, in one of his books *(A Grammar of Assent)* begins his work with a quotation from St. Ambrose which could well be placed on the flyleaf of every treatise of evidence which is to be used in court:

> *"Non in dialectica complacuit Deo salvum facere populum suum."*

Trade-Mark Law—Congress is being strongly urged to revise existing trade-mark statutes. The three articles we give about the proposed legislation represent what may be called a "Triangle" which is formed by the three divergent views of the matter.

The East and the West—The short but scholarly message to the Bar from Lord Halifax in this issue is implicit with the English world-point-of-view. The timely article on the United States Court for China by Judge Helmick gives a vivid picture of American interests in the opposite side of the world. These contrasting articles will help the busy lawyer keep his mental balance in the present world emergency, even though they are not dominantly legal in scope.

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AMERICAN MACHINIST • June 11, 1941

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LEGAL ASPECTS OF PRICE CONTROL IN THE DEFENSE PROGRAM

A PRESENTATION OF THE VIEWS OF THE OFFICE OF PRICE ADMINISTRATION AND CIVILIAN SUPPLY

By DAVID GINSBURG
General Counsel

PRICE control has been an integral part of the national defense program since its inception in midsummer of 1940. In the first stages of that program, the Price Stabilization Division of the Advisory Commission to the Council of National Defense, and since April 11, 1941, the Office of Price Administration and Civilian Supply,[1] have tried to maintain a stable level of prices, largely by enlisting the voluntary cooperation of business and by informal persuasion. To a considerable degree these efforts have been successful. Most business leaders realize that their own vital interests would be jeopardized by runaway inflation. But the existing authority over prices is indirect and circumscribed, and operates through measures which are not appropriate or applicable in all circumstances.[2] Voluntary cooperation will not survive against the enormous pressures and temptations of growing shortages and increased profits.

We are now spending about one billion dollars a month for defense. By the end of the year we shall be spending about one and one-half billion dollars a month. By the middle of next year we shall be spending about two billion dollars a month. Prices are rising largely because the people have more money to spend than there are goods to buy, and because the Government's rearmament purchases must go forward regardless of price.

Since the outbreak of the war abroad the Bureau of Labor Statistics index of 28 basic commodities has advanced 50%; the index of 900 wholesale prices has advanced 20%; and the cost-of-living index has advanced 7%. The accelerated rate of increase during the past three months has been tremendous. That rate is increasing.

In a special message to Congress on July 30, 1941,[3] the President reviewed the price situation and requested that steps be taken at once to extend, clarify, and strengthen the authority of the Government to act in the interest of the general welfare. "We face inflation unless we act decisively and without delay." Two days later companion bills proposing maximum price legislation were introduced in both Houses of Congress.[4]

This article will consider not the policy issues of price control, but the broad underlying legal questions presented by these bills—the constitutional basis for price fixing in the present emergency; the limitations imposed thereon by the due process clause; and the procedural and administrative provisions for carrying out the legislative purposes.

I. PRICE CONTROL LEGISLATION IS WITHIN THE POWERS OF CONGRESS

The authority of Congress to enact maximum price legislation at this time rests upon three distinct powers or groups of powers conferred by the Constitution. The legislation may be sustained upon the basis of the comprehensive fiscal, currency, and commerce powers of Congress. But most directly it would be a valid exercise of the national defense powers of Congress. The legislation is in the interest and furtherance of the national defense.

A. National Defense Powers

1. *The plenary powers of Congress to further the national defense are exercisable during the present emergency*

The relevant clauses of the Constitution are the several grants of authority to Congress, in Article I, section 8, to provide for the national defense and se-

1. For bases of authority, see Section 2 of the Act of August 29, 1916; Orders of the Council of National Defense, 5 F.R. 2114; 5 F.R. 2581; Executive Order No. 8734, 6 F.R. 1917.

2. Senator Taft and I have some long-standing differences as to the existing legal authority over prices. His opinion and my own are both contained in the Hearings before the Committee on Agriculture and Forestry, U. S. Senate, 77th Cong., 1st Sess., pursuant to S. Res. 117. See pp. 11-25, and pp. 45-58.

3. H. Doc. No. 332, 77th Cong., 1st Sess.

4. H.R. 5479 and S. 1810. The bills were referred to the Banking and Currency Committees of both Houses. Hearings began on H.R. 5479 on August 5, 1941.

curity.[5] Since the earliest days of the republic these powers have been recognized by all to be plenary and complete, perhaps the most complete powers conferred under the Constitution, and to embrace all provisions which are reasonably calculated to strengthen our defenses and to render our national existence more secure.

In an address before the American Bar Association, made in 1917, after he had been a Justice but before he became Chief Justice, Charles Evans Hughes spoke on "The Fighting Powers of the United States under the Constitution."[6] He said:

> "The power to wage war is the power to wage war successfully. The framers of the Constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government intrusted with the common defense. In equipping the National Government with the needed authority in war they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command."

It is in such broad and plenary outlines that the "war," or "defense" powers have been viewed by the Supreme Court. In *United States* v. *Macintosh*, 283 U. S. 605, 622, the Court said:

> "From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution, or in applicable principles of international law. In the words of John Quincy Adams, 'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property, and of life.'"[7]

These powers of Congress depend, not upon the presence of either armed hostilities or a declaration of war, but upon the presence of any circumstances which threaten the national safety. In the words of Hamilton, quoted in the address of Charles Evans Hughes:

> "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances, and ought to be under the direction of the same councils which are appointed to preside over the common defense."

Chief Justice Hughes said in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426, that "the war power of the Federal Government is not created by the emergency of war, but is a power given to meet that emergency." In the light of the lessons of World War experience, tragically supported by the course of the present war, there can be no dispute that a major rearmament effort must be begun long before the open clash of arms, if the effort is to be successful. The great power vested in Congress to wage war must therefore include the power to build up the defenses of the country, both to discourage attack, and to enable us to wage successful war in case of attack.

This conclusion is supported by judicial precedent. The embargo on commerce with England and France[8] was in part sustained by a Federal District Court at Salem, Massachusetts, on the ground that the measure was a proper exercise of the war power of Congress:

> "Congress has power to declare war. It, of course, has power to prepare for war; and the time, manner, and the measure in the application of constitutional means, seemed to be left to its wisdom and discretion."[9]

The same principle is recognized in the recent decision of *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326-328, upholding the construction of certain power projects pursuant to the National Defense Act of June 3, 1916 (39 Stat. 166, 215):

> "We may take judicial notice of the international situation at the time the Act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants are, and were intended to be, adapted to the purposes of national defense."[10]

Existing circumstances are such that the national defense powers may validly be exercised now. The outbreak of war prompted the President, on September 8, 1939, to issue a proclamation declaring a limited national emergency and directing measures "for the purpose of strengthening our national defense within the limits

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5. "The Congress shall have Power to lay and collect Taxes, • • • to pay the Debts and provide for the common defense and general welfare of the United States. • • •

• • • •

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of money to that Use shall be for a longer Term than two years;

"To provide and maintain a Navy;

"To Make Rules for the Government and Regulation of the land and naval Forces;

"To provide for calling forth the Militia, to execute the Laws of the Union, suppress Insurrections and repel Invasions;

• • • •

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all Other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

6. Cong. Rec., vol. 55 (65th Cong., 1st Sess.), part 8, Appendix, p. 551 *et seq.*

7. The Supreme Court has upheld the power of the Federal Government in the interest of national defense to draft the able-bodied man power of the nation for service in the armed forces, *Selective Draft Law Cases*, 245 U. S. 366; to take over and operate railroads, *Northern Pacific R.R. Co.* v. *North Dakota*, 250 U. S. 135; to take over and operate the telegraph and telephone systems, *Dakota Central Telephone Co.* v. *S. Dakota*, 250 U. S. 163; and to place compulsory orders for materials required for national defense, *Moore & Tierney Inc.* v. *Roxford Knitting Co.*, 265 Fed. 177 (C.C.A. 2d), certiorari denied, 253 U. S. 498.

8. Instituted by President Jefferson December 22, 1807, and supplemented by Acts of January 9, 1808; March 12, 1808; April 25, 1808; and January 9, 1809 (2 Stat. 451, 453, 499, and 506).

9. Cited in F. Blake, Examination of the Constitutionality of the Embargo Laws, p. 56. The decision rested primarily on the commerce power.

10. See also *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668; *Nashville, C. & St. L. Ry. Co.* v. *Walters*, 294 U. S. 405, 417. The Chief Justice of the Supreme Court of Australia, in upholding the price control features of the War Precautions Act of 1914-1916, likewise said that the war power of the legislature "includes preparation for war in time of peace." *Farey* v. *Burvett*, 21 Comm. L.R. 433, 441.

As Professor Willoughby points out, in his famous text, The Constitution of the United States, 2d ed., p. 1574, the principle that the "war" power includes a "defense" power existing in the absence of hostilities is also shown by the precedents upholding the exercise of the war power after termination of armed hostilities, and referring to the wide discretion which must be left to Congress in this matter. See *Stewart* v. *Kahn*, 11 Wall. (78 U. S.) 493, 506-507; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51; *Ruppert v. Caffey*, 251 U. S. 264.

of peacetime authorizations."[11] The terrible spread and movement of the war has brought increasing danger. On May 27, 1941, the President proclaimed that "an unlimited national emergency confronts this country, which requires its military, naval, air and civilian defenses to be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere."[12]

Congressional enactments reflect the threat to our defense. Over 47 billion dollars have already been appropriated for defense.[13] Normal procurement procedures have been relaxed to permit the expediting of orders placed by the Army and Navy.[14] Priorities have been established to give preference to Army and Navy orders over orders for private account or for export,[15] and more recently to institute complete allocation of materials when fulfillment of defense orders results in a residual shortage.[16] Registration of all aliens has been required.[17] The President has been given authority to lend or lease war materials to foreign belligerent governments whose defense the President deems necessary to the national security.[18]

Most important of all are the provisions of the Selective Service and Training Act of 1940,[19] which include far-reaching provisions for the drafting of man power, for the placing of compulsory orders, and for the requisitioning of productive facilities. And in upholding the validity of this Act, the Federal Courts have clearly recognized that the defense powers of Congress may be exercised under present circumstances. In *United States* v. *Rappeport, et al,* 36 F. Supp. 915,[20] the District Court for the Southern District of New York pointedly stated:

> "That the United States may be unprepared to resist an aggressive and destructive force which has subjugated many peaceful nations and which may seek to overpower the United States presents an emergency as serious as armed conflicts in which the power to draft could not be questioned."

2. *The national defense powers include the authority to adopt appropriate measures to prevent inflation and to promote price stability*

The wide discretion which Congress normally enjoys in determining what measures are appropriate for carrying into effect granted powers *(M'Culloch v. Maryland,* 4 Wheat 316, 420) is fully available to Congress in exercising the powers "upon which the very life of the Nation depends." *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 163. Supreme Court precedents upholding the World War price-fixing legislation establish the validity of a Congressional determination that price control is one of the measures needed for carrying on a large-scale defense program.

In the Food and Fuel Control Act (Lever Act) of August 10, 1917, as amended, Congress provided for the regulation of prices on such products as food and fuel. In *United States* v. *Macintosh,* 283 U. S. 605, 622, the Court approved the constitutionality of that price fixing, stating: "To the end that war may not result in defeat, * * * prices of food and other necessities of life (may be) fixed or regulated." Although in view of the limited scope of the Lever Act the Court had no occasion to consider the validity of statutes authorizing price regulation for other commodities, plainly the same considerations apply.

In *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, the Supreme Court sustained the propriety of maximum price regulation of coal as part of the country's vast industrial effort. The Court traced the price history of coal from 1916, the disruption of the market due to demands created by preparations for national defense, the panic among consumers, and the increased cost of fuel to the Government. It concluded that there was justification for the view that "in the interest of national safety, there was need of regulation in order to prevent manipulations to enhance prices by those having coal for sale and to lessen apprehension on the part of consumers in respect to their supply and the price liable to be exacted." (p. 261). See also *Dupont Co.* v. *Hughes,* 50 F.(2d) 821 (C.C.A. 3d).

These judicial precedents put to rest any legalistic doubt as to whether the proposed legislation is a permissible exercise of the powers delegated to Congress; but it may be appropriate, in view of the significance of price control, further to consider the importance of price stability to the defense program.

For present purposes, inflation may be defined as the condition resulting from a large increase in the amount of money available for the purchase of commodities without a corresponding increase in the volume of commodities. There may be some dispute regarding this definition. There may be differences of opinion as to just how inflation is caused, and when its presence may be detected. But there can be little doubt that a large-scale defense program brings with it the danger of a rising price spiral, accompanied by grievous social and economic consequences hampering, and even undermining, the defense program.

Those consequences are lucidly and succinctly analyzed by President Roosevelt in his message of July 30, 1941:

> "Producers, unable to determine what their costs will be, hesitate to enter into defense contracts or otherwise to commit themselves to ventures whose outcome they cannot foresee. The whole production machinery falters.
>
> "Speculators anticipating successive price advances, withhold commodities from essential military production.

11. 4 F.R. 3851.
12. 6 F.R. 2617.
13. Office of Production Management, Release 792, July 26, 1941.
14. Pub. No. 703, 76th Cong., approved July 2, 1940 (Army); Pub. No. 671, 76th Cong., approved June 28, 1940, sec. 1 (Navy).
15. Pub. No. 671, 76th Cong., sec. 2 (a), approved June 28, 1940.
16. Pub. No. 89, 77th Cong., approved May 31, 1941.
17. Pub. No. 670, 76th Cong., approved June 28, 1940.
18. Pub. No. 11, 77th Cong., approved March 11, 1941.
19. Pub. No. 783, 76th Cong., approved September 16, 1940.
20. Affirmed *Herling* v. *United States,* C.C.A. 2d, decided June 21, 1941. Accord: *Stone* v. *Christensen,* 36 F. Supp. 739, 742-743.

"Costs to the Government increase, and with it the public debt.

"Increases in the workers' cost of living, on the one hand, and excessive profits for the manufacturer, on the other, lead to spiraling demands for higher wages. This means friction between employer and employed."

The need for price control legislation is also indicated by the experiences of this country in the past, particularly during the World War.[21] Bernard M. Baruch, who so brilliantly captained our industrial effort during 1917 and 1918, has outlined the dangers of the price situation then encountered:[22]

"As to the morale of the generality of civilians we all know how it was affected—especially among soldiers' families and people of fixed income—by the upward spiraling of the cost of living and the lavishness of reward to those who were in a position to profit by it as compared with the hardships imposed on those who were compelled to suffer from it.

"As to morale of industry at large in the World War, the uncertainty of the daily fluctuation of price and the inevitable rising trend on all sides was matter for common commiseration. I am aware of no able and experienced business administrator who does not prefer operation under stable conditions to operation under a price schedule in an unforeseeable state of flux."

The situation was such that President Wilson stated, on July 12, 1917:[23]

"They (prices) mean the efficiency or the inefficiency of the Nation . . . they mean victory or defeat."

Apart from the Lever Act which was of limited coverage,[24] the President and his appointees, in the absence of statutory authority but without remonstrance from Congress, established maximum prices for a wide range of commodities—by agreement if possible, and if not, by direct fixing of maximum prices.[25] The controls were indirect, and the price control program was of only limited effectiveness; but the desirability and indeed the need of price control was clear, and accounted for the action which was taken.

After careful study various Congressional committees have recognized the importance of equalizing the burdens of war, of controlling and stabilizing prices, and of conferring power to establish maximum prices.[26] Bills providing for industrial mobilization in time of war, including broad price control provisions, have been favorably reported by committees of both Houses as in furtherance of the national defense and security,[27] and one such bill passed the House by an overwhelming majority in 1935.[28] Foreign nations, engaged in defense programs, democratic and totalitarian alike, have come to appreciate the importance of, and have established, price control.[29]

Today, although we are not at war, the impact of the rearmament program upon our domestic economy is not substantially different than if we were at war. Certainly it requires equally decisive action. Under such circumstances it is plain that Congress may constitutionally enact legislation to control commodity prices in the exercise of its national defense powers.

B. *Fiscal, Currency and Commerce Powers*

Price control legislation is also valid as an exercise of the fiscal, currency and commerce powers vested in Congress. Prior to the adoption of the Constitution, the national government had impotently struggled against the ruinous progress of an inflation engendered by the Revolutionary War. Full power to control fiscal policy was given to the Congress in the light of this experience. In subsequent periods of national crisis, the fiscal and currency powers have been invoked to sustain legislation required to meet the needs of the emergency and the Supreme Court has found the powers to be adequate to sustain such action. See the *Legal Tender Cases*, 12 Wall. 457; *Juilliard* v. *Greenman*, 110 U. S. 421; the *Gold Clause Cases*, *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U. S. 240, *Nortz* v. *United States*, 294 U. S. 317, *Perry* v. *United States*, 294 U. S. 330.

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21. The Continental Congress, attempting to stabilize prices and check the course of the inflation induced by the Revolutionary War, appealed, in 1777, and twice in 1779, to the States for price controls. George Washington approved this effort, saying in a letter to Joseph Reed of Pennsylvania on December 12, 1778: "No punishment in my opinion is too great for the Man who can build his greatness upon his Country's ruin." Washington, *Writings*, Vol. 13, pp. 382-383; quoted in S. Rep. No. 480, 75th Cong., 1st Sess., p. 10. Many of the States adopted price controls, but several did not. Failure to achieve uniformity of action and difficulties with currency led to a breakdown of the price fixing program. See Note: *State Regulation of Prices under the Fourteenth Amendment*, 33 Har. L. Rev., 838-841; 4 Law & Contemporary Problems, 273-300; Clark, *Emergency Legislation Prior to December 1917*, U. S. Justice Dept., G.P.O. 1918.

22. War Policies Commission Hearings (held pursuant to Public Res. No. 98, 71st Cong., 2d Sess.), pp. 812-813. It has been estimated that the cost to the Government of the World War was increased by 15 billions of dollars on account of the price inflation which took place. See Baruch, *American Industry in the War*, (1941) pp. 447-453.

23. Address to the Mine Operators and Manufacturers of the United States, July 12, 1917.

24. Food and Fuel Control Act of August 10, 1917, 40 Stat. 276, amended October 22, 1919, 41 Stat. 297.

25. With reference to "price fixing by agreement" Mr. Baruch had this to say: "We used a good many euphemisms during the war for the sake of national morale, and this one of 'price fixing by agreement' is a good deal like calling conscription 'Selective Service' and referring to registrants for the draft as 'mass volunteers.' Let us make no mistake about it: we fixed prices with the aid of potential Federal compulsion and we could not have obtained unanimous compliance otherwise." B. M. Baruch, *American Industry in the War*, p. 440.

26. The War Policies Commission, established pursuant to Public Res. No. 98, 71st Cong., 1931, after holding extensive hearings summarized in H. Doc. No. 271, 72d Cong., 1st Sess., recommended as part of a complete program for war emergency that "Congress should empower the President, in the event of war, to institute a program under which prices may be stabilized and thereafter adjusted at such levels as will minimize inflation and will secure to the government the use of any private property needed in the prosecution of the war without affording the owner thereof profit due to the war." H. Doc. No. 264, 72d Cong., 1st Sess., March 3, 1932. The War Department, particularly in its Industrial Mobilization Plans, has also consistently recognized the need for price control as part of any general plan to meet a defense emergency. See, Industrial Mobilization Plan, 1931, War Policies Commission Hearings, H. Doc. 271, 72d Cong., p. 393 *et seq*. Industrial Mobilization Plan, Revision of 1933, Senate Committee Print No. 2, Senate Munitions Committee, 74th Cong. Industrial Mobilization Plan, Revision of 1936, G.P.O. 1936. Industrial Mobilization Plan, Revision of 1939, Sen. Doc. No. 139, 76th Cong., 2d Sess.

27. For Committee Reports, see 74th Cong.: House Report No. 119; Senate Reports Nos. 577, 889, 2337. 75th Cong.: House Reports Nos. 808, 1870; Senate Report No. 480.

28. H.R. 5529, 74th Cong., passed the House, 368 to 15.

29. Hearings before the Committee on Banking and Currency, House of Representatives, 77th Cong., 1st Sess., on H.R. 5479, August 6, 1941, p. 60, *et seq*.

In *Norman* v. *Baltimore & Ohio R.R. Co., supra,* Chief Justice Hughes said:

> "The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers. *Juilliard* v. *Greenman, supra,* pages 439, 440 of 110 U.S. 4 S. Ct. 122, 125." (294 U.S. at 303).

Price control legislation in the present emergency is clearly within the power to regulate the value of money, since it provides a means of stabilizing the general level of prices and of preventing inflation. The legislation which is required at the present time must embrace the entire price structure, in order to protect the general level of prices. A particular commodity is affected by the legislation only when its price is subjected to inflationary pressures which drive it above the general price level and thereby threaten the stability of the entire price structure. The value of the dollar is measured by its purchasing power in terms of the general level of prices. Thus this type of regulation is inseparable from the regulation of the value of money itself.

It should also be noted that Chief Justice Hughes, in *Norman* v. *Baltimore & Ohio R.R. Co., supra,* referred to the commerce power as one of the finance powers which may be relied upon by Congress in exercising to the full its authority over the national currency in time of emergency. This is not surprising, for it is obvious that general price legislation designed to prevent inflation is an appropriate measure to foster and protect interstate commerce.[30]

The comprehensive powers of the national government over revenue, finance, currency and commerce are peculiarly appropriate to the protection of our entire economy from the dangers of inflation in the present emergency. A stable currency and the unquestioned credit of the United States are the foundation stones upon which a successful program of national defense must rest.

II. PRICE CONTROL LEGISLATION AND THE FIFTH AMENDMENT

In the exercise of its national defense powers, as in the exercise of all other powers, Congress is prohibited from depriving persons of life, liberty or property without due process of law. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156. But, as already shown, price control is necessary in the interest of national defense, and affords protection against inflation and the disruption of the currency and credit structure. And where the means chosen by Congress are appropriate to a permissible end "there is little scope for the operation of the due process clause." *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, 558.

Charles Evans Hughes, in his 1917 address, cogently warned that the other provisions and amendments of the Constitution must not be construed so as to render ineffective the national defense powers "essential to the safety of the Nation." He said:[31]

> "These may all be construed so as to avoid making the Constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defense and the perpetuity of our liberties. These rest upon the preservation of the Nation."

There is no longer the slightest basis for the contention that price-fixing legislation cannot be applied to commodities generally, but only to a limited class of businesses "affected with a public interest." That objection could only have been based upon the cases of *Tyson* v. *Banton,* 273 U. S. 418 and *Ribnik* v. *McBride,* 277 U. S. 350. However, the more recent decisions of the Supreme Court in *Nebbia* v. *New York,* 291 U. S. 502, and *Olsen* v. *Nebraska,* 61 Sup. Ct. 862, (specifically overruling the *McBride* case) demonstrates that the contention is completely without merit. In the *Nebbia* case the Court said:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." (291 U. S. at 538-9).

In the *Olsen* case, which sustained a state statute regulating charges made by employment agencies, the Court expressly rejected any limitation on price regulation to businesses affected with a public interest, and broadly upheld the power of the states to regulate prices wherever they deemed such regulation to be required in the public interest.

The power of Congress to legislate for the national defense is subject to no greater limitations under the due process clause than is the police power of the states. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146. Of course, a particular price control statute may be so arbitrary and oppressive as to deny due process of law. That objection cannot successfully be urged with respect to the bills pending in Congress.

The basic provisions of the proposed legislation, far from constituting a tyrannical or oppressive interference with private rights, are plainly reasonable provisions to achieve the basic purpose of preventing price spirals and inflation. Price ceilings will be established for commodity prices which have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the Act. Price ceilings will be fair and equitable among buyers and sellers of the commodity generally. And so far as practicable specific ceilings will be established with due consideration to the prices

30. Recent decisions of the Supreme Court also make it clear that even in normal times the commerce power will support the regulation of prices in transactions subject to the commerce power, allowing to Congress a large measure of discretion with reference to the purposes to be accomplished by such regulation. *United States* v. *Rock Royal Cooperative Co.,* 307 U. S. 533, 569-571; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Darby Lumber Co.,* 312 U. S. 100; *Mulford* v. *Smith,* 307 U. S. 648; *Currin* v. *Wallace,* 306 U. S. 1.

31. 55 Cong. Rec. pt. 8, pp. 551, 555.

prevailing for the commodity on or about July 29, 1941, adjusted for speculative fluctuations and for general changes in costs, profits, and similar factors of general applicability. These were prices established by buyers and sellers themselves under normal competitive conditions. Regulation is authorized only as a result of, and to counteract, the distortion of normal competitive forces growing out of an inflexible and increasing governmental demand for goods, and an insufficient supply.

The right to charge a certain price for a commodity has only relative value, measured by the prices prevailing for other commodities. To the extent that all prices and price relationships are stabilized, a producer is not injured by price regulation merely because he is not able to charge prices as high as he otherwise might have charged.

There is no constitutional right to increase prices during an emergency or to profit as a result of shortages caused by or contributing to an emergency. This is established by *Highland v. Russell Car Co.*, 279 U. S. 253. That case involved a suit on a contract for the purchase of coal. The seller had succeeded in exacting from his customer a price of $4.05 per ton. The Fuel Administration, acting under Section 25 of the Lever Act, fixed a price of $2.45 per ton. The buyer refused to pay more than this fixed price, and the seller sued for the difference, asserting that the price regulation was invalid and that he was entitled to the price fixed by his contract. The Court gave judgment against the seller, stating that the Act and orders "will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth." The Court held that, as applied to the coal in question, "The statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment." (p. 262).

Similarly, in *Block* v. *Hirsch*, 256 U. S. 135, the Court noted that the District of Columbia rent legislation would deprive the landlord of the power of profiting by the influx of people to Washington "and thus of a right usually incident to fortunately situated property." Nevertheless the rent legislation was upheld. Compare *Nortz* v. *United States*, 294 U. S. 317; *United States* v. *Hudson*, 299 U. S. 498; *Legal Tender Cases*, 12 *Wall.* 457.

In exercising their powers both the federal government and the states may consistently with due process prescribe regulations diminishing the value of property, provided that their powers are not exerted arbitrarily and the legislature has not abused its broad discretion in selecting the means of promoting the public interest. See *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, *Reinman* v. *Little Rock*, 237 U. S. 171, *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Miller* v. *Schoene*, 276 U. S. 272; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

In *Ruppert* v. *Caffey*, 251 U. S. 264, the Court upheld the application of the war-time Prohibition Act to non-intoxicating liquor, notwithstanding the hardships due to the fact that no time was allowed for the disposal of such liquor and of valuable brewing properties. The Court rejected the argument that this was a prohibition which could be enforced legally only if compensation were made. It pointed out that there was no "taking" of property which required the payment of "just compensation" but only a regulation of property which was valid and not arbitrary.

> "Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use." (251 U. S. at 303).[32]

Particular hardships in the application of a price ceiling which is generally fair and equitable to buyers and sellers of the commodity cannot be anticipated in advance. It is a commonplace, however, that regulation which is generally valid and in the public interest may not be held invalid because it imposes hardship upon particular individuals.[33] In the exercise of its "war" or "national defense" powers, Congress is vested with a wide latitude of discretion and "its action, unless purely arbitrary, must be accepted and given full effect by the courts." See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 163. Congress may, without obstruction from the due process clause, require the able-bodied men of this country to give their services to the nation for $21 or $30 a month. Congress may cause great hardship to companies who, having contracts for supplies at a certain price, find that the Government through priorities has redirected the flow of goods so that they are either left without materials or are relegated to purchase from other sources at higher prices. *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. Similarly Congress may, without obstruction from the due process clause, provide for the fixing of prices in the interest of national defense. The legislation may bring about inconveniences, or even hardships, but these, like other inconveniences or hardships, must be borne when a higher national interest must be served.

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32. In accord, see *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188-190; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, 262; *DuPont deNemours & Co.* v. *Hughes*, 50 F. (2d) 821 (C.C.A. 3d). The just compensation clause of the Fifth Amendment is applicable only when the Government takes property away from the owner. The legislation under consideration in Congress specifically provides that nothing contained therein shall be construed to require any person to sell any commodity.

The concept of a fair return on fair value is applicable only to public utility regulation and public utilities are explicitly excluded from the scope of these bills. Public utility rate regulation differs essentially from price regulation of the kind here involved because it singles out individual units in particular industries for special obligations with respect to the community. It is the close analogy of this process of regulation to a taking of particular property for public use that leads to the fair return on fair value rule. The pending bills, on the other hand, involve general regulation of all non-utility businesses largely on the basis of market prices prevailing before the regulation goes into effect. Compare *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440; *Hegeman Farms Corp.* v. *Baldwin*, 6 F. Supp. 297, affirmed, 293 U. S. 163.

33. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Pierce Oil Co.* v. *Hope*, 248 U. S. 500; *United States* v. *Hudson*, 299 U. S. 498; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573.

III. PROCEDURE AND ADMINISTRATION

All of the authority under the pending bills is vested in the President who is permitted to delegate his authority to such departments, agencies, or persons as he may designate or appoint. The wisdom of this flexible approach, as contrasted with the proposals for a rigid 5-man, bi-partisan, inter-departmental, or other kind of board or commission, is indicated by our own World War experience, as well as by our experience during the present defense program.

Time and again Mr. Baruch has warned that, although we need committees for counsel, we must have administrators for action. Objective studies of the operations of the original War Industries Board have indicated that its chief defect was that it was a committee.[34] And when Congress passed price control legislation during the World War, authority was delegated directly to the President, who in turn delegated authority to individual administrators.[35]

An emergency calls not for partisan, or group, or special or vested interest representation, with its necessary concomitants of delay, compromise and inaction. It calls for bold decision and rapid execution by an administrator in whom both authority and responsibility are centered, under the supervision of the President, who represents all classes and all groups in the community.

Boards and commissions have proved useful in normal times primarily to secure a continuity of policy and decision through the exercise of quasi-judicial and quasi-legislative functions, independently of the executive. Ordinarily they are designed to operate over long periods of time, and gradually to implement a growing body of regulatory legislation.[36] But this is an emergency. The duration we trust will be short. Adaptability and coordination will be at a premium. The President, and the President alone, is responsible for the direction and coordination of the entire defense program. Billions of dollars have been appropriated by Congress for expenditure under his guidance. Legislation has been enacted giving him authority to require priority for defense orders, to place compulsory orders, to requisition industrial plants, and to ration supplies for civilian use. This is no usurpation or aggrandizement of power. Under the Constitution, the President is our Chief Executive, and Commander-in-Chief of the Army and Navy; therefore he must shoulder responsibility for the successful execution of the defense program which Congress has authorized. This is the crux of the matter and there is no other fundamental issue. Price control is not an isolated phase of this program; it is an integral part of economic mobilization for defense. To deprive the Chief Executive of authority for price stabilization in the defense program by the creation of an independent Board or Commission would be wilfully to ignore the teachings of history and experience.

The pending bills delegate to the President authority to establish maximum prices by issuing "ceiling" regulations in accordance with standards prescribed by Congress. Thus, this legislation entirely avoids the problem involved in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, where the Supreme Court held unconstitutional a provision of the Lever Act of 1917 making it unlawful for any person wilfully to make any unjust or unreasonable rate or charge for handling or dealing in necessaries. The fatal defect of that statutory provision was its uncertainty or indefiniteness. All those subject to its provisions were left to determine at their peril what was an unreasonable or unjust price. The pending bills impose no such risks since a particular price is not made unlawful until the President has established a ceiling.

The standards in the pending bills are fully as definite as those contained in comparable legislation upheld by the Supreme Court. *United States* v. *Rock Royal Cooperative*, 307 U. S. 533; *Opp Cotton Mills* v. *Administrator*, 61 Sup. Ct. 524; *New York Central Securities Corporation* v. *United States*, 287 U. S. 12; *Radio Commission* v. *Nelson Brothers*, 289 U. S. 266. Not only must the maximum prices established be fair and equitable and in accord with the purposes of the act but they also must be established, so far as practicable, with due consideration for prices prevailing on a particular date before the legislation became effective.

Congress need not specify more than is reasonably practicable in view of the type of regulation. It may set forth broad standards to be applied by expert executive agencies equipped to act with flexibility and dispatch. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 398. Congress need not set forth a mathematical formula for determining prices so long as it gives ample indication of the various factors to be considered. *United States* v. *Rock Royal Cooperative*, 307 U. S. 533,

34. Grosvenor B. Clarkson points out in his book, *Industrial America in the World War* (1923) that, "The defect of the War Industries Board as at first created was that it was a committee. Committees are good for counsel, but poor for action, and especially so when their authority is nebulous, and for lack of leadership they do not stretch it and strengthen it by use." (p. 51)

35. There was at the time considerable debate on whether the Department of Agriculture or a special Food Administrator should be given power to control food. The President, following a White House conference on May 12, 1917, issued a statement explaining that the normal activities of the Department of Agriculture for food production, conservation, and marketing should be carried on but that "The emergency powers asked for over distribution and consumption, imports and exports, prices, purchase and requisition of commodities, storing, etc., should be placed in the hands of a food administrator appointed by the President and directly responsible to him • • • the proposed administration • • • is intended of course only to meet a manifest emergency and is to continue only while war lasts." (Official Bulletin No. 10 of the National Defense Advisory Commission, May 21, 1917, p. 4).

Section 25 of the Lever Act authorized the President to fix the price of coal and coke. It also provided that "said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission." The President appointed Dr. Harry A. Garfield, Fuel Administrator and delegated to him the price fixing authority. The exercise of this authority was sustained in *MacDonald Coal Mining Co.* v. *United States*, 56 Ct. Cl. 440, affirmed on other grounds, 261 U. S. 608. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253.

36. The Interstate Commerce Commission (in the field of transportation), the Federal Trade Commission (in the field of competitive practices), and more recently, the Securities and Exchange Commission (in the field of financial practices), are excellent examples of this salutary practice.

at 577. Congress may accept the executive judgment as to the weight to be given the various factors. *Opp Cotton Mills* v. *Administrator,* 61 Sup. Ct. 524, 533. Furthermore, the scope of the discretion which Congress may constitutionally accord to the Executive is increased in time of a defense emergency. See *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *United States* v. *Chemical Foundation,* 272 U. S. 1; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304.

In appraising the administrative procedure provided for the establishment of maximum prices it must be remembered that the establishment of such prices involves the exercise of delegated legislative power rather than quasi-judicial power. It follows that the procedural standards which must shape the character of the principal administrative proceedings under the statute are derived from congressional rather than judicial hearings. As the Supreme Court has clearly indicated in such cases as *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, and *Bi-Metallic Investment Co.* v. *Colorado,* 239 U. S. 441, the constitutional requirements applicable to adversary or quasi-judicial proceedings are not relevant to the exercise of delegated legislative power, and Congress may properly provide for whatever kind of proceedings it considers appropriate. As a matter of fact the pending bills require at least a shortened form of administrative hearing on written evidence at the request of any one subject to the provisions of a price regulation.

Of course, any one subject to an administrative regulation establishing maximum prices is entitled to his day in court for the review of the regulation. The pending bills provide for such review in an Emergency Court of Appeals, consisting of United States circuit and district judges, from which petition for certiorari may be filed with the Supreme Court. The questions for judicial determination are whether the regulation is not in accordance with law and whether it is arbitrary or capricious. These are the standards for judicial review of the exercise of delegated legislative authority which the courts have laid down for use in the absence of any statutory provision on the subject. See *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 236; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176. The pending price control bills provide these same standards for review of price regulations by the Emergency Court. If the statute were to authorize the courts to substitute their own judgment for that of the President on the fairness and equitableness of the ceilings established it would, in effect, require the courts to enter those realms of legislative policy from which courts, particularly constitutional courts, are traditionally excluded. See *Keller* v. *Potomac Electric Co.,* 261 U. S. 428; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464.

PRICE FIXING—A NECESSARY EVIL

By HON. ROBERT A. TAFT
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1. Price-Fixing Power Usurped

SINCE February seventeenth, Mr. Leon Henderson, in his capacity as head of the Division of Price Stabilization of the National Defense Advisory Commission, and later as Administrator of the Office of Price Administration and Civilian Supply, has been issuing orders purporting to fix prices. These orders are all drafted like statutes, and make a pretense of being issued under legal authority and having the effect of law. Mr. Henderson secured an Executive Order authorizing him to "determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable." But no law authorizes the issuance of such an Executive Order.

As a matter of fact, during that period there has not been the shadow of statutory or constitutional authority for any such price fixing, although Mr. Henderson appeared before the Senate Agricultural Committee and claimed such power. His only argument seemed to be that during the World War the War Industries Board fixed prices without specific statutory authority. Most of the general price fixing affecting the public during the World War was done by the Food Administration and the Fuel Administration, and was based on specific statutory authority in the Lever Act. The War Industries Board dealt only with materials needed by the government, and, largely because it had no authority, operated basically through agreements with the industries concerned.

If Mr. Henderson has power to fix prices in the present state of the law, then the American people have no rights left under the Constitution, and Congress

might as well adjourn and go home. As a matter of fact, he finally has admitted his lack of authority, and has presented to Congress a price-fixing statute, giving the broadest kind of authority to the President, which he in turn may delegate to Mr. Henderson. The bill drafted by the administration has been introduced in both Houses of Congress, and is being considered first by the House of Representatives.

2. Powers Granted by the Proposed Bill

The proposed bill grants all powers to the President individually, but provides that he may delegate his power to any "department, agency, officer or employee."

The bill confers power to establish such a ceiling as will be generally fair and equitable to buyers and sellers whenever in the judgment of the President a price has risen, or threatens to rise, to an extent or in a manner inconsistent with the purposes of the act. He is directed, as far as practicable, to give consideration to the prevailing price on July 29, 1941, and to make adjustments for such relevant factors as he may consider important, including "speculative fluctuations, general increases or decreases in costs of production and transportation, and general increases or decreases in profits earned by sellers of the commodity" after July 29, 1941. The President is also given power to establish ceilings for rents in defense areas.

He is further given power to buy and sell commodities at prices above the ceiling price, apparently in order to favor and encourage high-cost producers of commodities, where a shortage exists, without increasing the ceiling price for the more efficient producers in the same industry. The act provides that agricultural price ceilings shall be at least 110% of parity.

The President is given power to issue orders and regulations, and disobedience is punishable by fine and imprisonment, as well as by punitive damages recoverable by those who buy commodities above the ceiling price. A rather curious provision establishes an Emergency Court of Appeals, to consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States District Courts and Courts of Appeals. It is provided that any person who is aggrieved by a regulation or order may file a protest with this Court of Appeals, asking that it be set aside, in whole or in part; but the court has power to set aside a regulation or order only if it is found to be not in accordance with law, or arbitrary, or capricious. Since the fixing of any price is within the almost complete discretion of the President, it is difficult to see how a court could set aside any regulation or order likely to be issued. No such court would have power to review the reasonableness of price fixing unless the price fixed was overwhelmingly outrageous.

The act not only covers commodities, but by definition permits the fixing of prices on services of all kinds rendered in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment. This would seem to cover all services, including those of brokers, lawyers, repairmen, truck operations, etc. The act applies even to municipal corporations and states.

3. Price Fixing A Dangerous Power

The power to fix prices, even without the power to fix wages, is a very definite threat to individual freedom. If a government undertakes permanently to fix prices of commodities, not only for government purchase, but for every individual transaction in the United States, it means the regulation of literally millions of transactions every day of the year. It brings the government into the daily and hourly life of every citizen. It puts the existence of every business at the mercy of the government. It means a steady extension of government control, for it is impossible to regulate one article successfully without regulating everything that competes with it. We found in the A.A.A. that we could not regulate wheat and corn and cotton without going on to peanuts and potatoes. In order to control prices successfully over a long period of time, regulations must ultimately go on to fix all the practices in every business, for nearly all of those practices have some effect on prices. We have seen in the case of the railroads how the original power to fix rates has been extended until every action of the railroads today is practically controlled and directed by the government. The stagnating effect of that control of railroads is obvious, and, if extended to all industries in the United States, it would inevitably kill the initiative upon which progress depends.

In the long run, in peace-time, price fixing must be abandoned unless wages also are fixed. When that result is finally reached, it is but a step to a complete socialization of all business activity. I have frequently protested against any such policy, except in the case of public utilities where a monopoly must exist by reason of the nature of the business.

4. The Dangers of Inflation

Nevertheless, today we face certain dangers which threaten to be even worse than price fixing. Because of the war in Europe and the policies adopted by this government, we face a serious danger of inflation. Prices already have begun to rise, and there is every evidence that they will continue at an accelerated pace if the government does not intervene. This is due primarily to the tremendous defense program and operations under the Lease-Lend Act. In the year ended July 1, 1941, there was a government deficit of five billion dollars. In the year ending July 1, 1942, government and lease-lend expenditures are likely to total twenty-five billion dollars, and our taxes, even with the current tax bill, are not likely to exceed fourteen billion dollars, leaving a deficit of eleven billion dollars. However successful the effort to sell defense bonds, a great

part of this deficit is going to be financed by the sale of bonds to the banks; that is by the banks extending billions of dollars of paper credit to the government. That money is promptly paid out for labor and materials, and most of it is used immediately for the purchase of non-defense goods. Seven or eight billion dollars of purchasing power is going to be created out of thin air, and will expand production to its physical limit, not only in defense, but in non-defense activity, and will create a tremendous artificial boom in the United States. The inevitable result will be a shortage of goods and a steady rise in prices, such as took place during the year 1916, just before we entered the World War. Inflation is all the more possible because of the possible expansion of private credit through the tremendous excess reserves in the banks, resulting from the government's gold policy and the general stagnation of private industry during recent years.

The result of such inflation threatens the security of the country. The government will have to pay more for the various materials it needs for the manufacture of defense materials. That danger can perhaps be held in check by the power to order priorities for government needs and by a patriotic appeal to manufacturers, but in the long run the government's costs are bound to be affected. More important still, the general market price rise will affect every individual in the United States and increase his cost of living. That in turn will force a rise in wages and a further corresponding rise in prices until a complete spiral upwards is established. A change in the whole price level is a tremendous hardship on all those who draw fixed salaries, on individuals living off the investments made from their past savings, on insurance policyholders, and on colleges and other institutions paying their expenses from endowment funds. It is hard to exaggerate the injustice resulting from a price increase which might easily amount in a year to 100%.

But even this danger is less than that which will occur after the war is over. At best we face a dangerous reaction when the defense program tapers off. If prices have risen to unnatural levels, that reaction is all the more violent. History seems to show that the more excessive the boom, the greater the depression. That means tremendous unemployment, hardship, injustice, bankruptcy for countless businesses, and a condition which may well threaten the permanence of our institutions.

Alternatively the government may be called upon to go on with a policy of tremendous deficit spending in order to prevent a depression. If that policy is adopted, it may postpone the evil day, but ultimately the debt will become so large that it can only be met by repudiation and currency inflation. It is hardly necessary to say that a period of extreme currency inflation is even more dangerous to democratic institutions than a depression.

5. Remedies for Inflation

I feel, therefore, that we cannot hesitate to grant the government power to do everything possible to restrain inflation during the war. There are a number of policies which can have this effect.

The most obvious one is to reduce the government deficit so that artificial purchasing power is not created. This can be done, on the one hand, by reducing non-defense expenditures, and certainly a billion dollars can be taken from those expenses if the President and Congress will cooperate in doing so. On the other hand, we can raise more taxes. There is probably a limit to what can be done in this line, but I believe that we can safely go a considerable way beyond what is now contemplated. If the government is creating ten billion dollars in additional purchasing power, a way should be found to collect five billion dollars of it back in fair and equitable taxation.

In the second place, the government should be given increased power to control the expansion of private credit, although this is not an immediate threat to be compared with the dangers arising from the expansion of public credit. It can remove the threat of further inflation through the President's power to devalue the dollar and issue three billion dollars of greenbacks.

Finally, we can give power to fix prices and wages, or both. This power cannot prevent inflation, nor can it prevent a gradual rise in prices. But it can slow up the process, and perhaps eliminate the possibility of runaway prices. If wages are not included, it is less effective, but I believe it can have a very successful effect even without wage control. Of course if wages do increase, prices will have to be gradually increased to conform to the increased cost of production. The idea that wages can be increased over a long period without an increase in prices, by decreasing profits, is completely untenable. Some companies may be able to absorb higher wages without increasing prices, but many other companies in the same industry, particularly the smaller companies, will be forced to the wall by such a policy. The way to reach the profits of the more efficient companies is by excess profits taxation, and not by holding down prices to an unreasonable level.

6. Price Fixing—With Safeguards

I have come reluctantly, therefore, to the conclusion that power must be given to the Executive Departments to fix prices. I have come to that conclusion more reluctantly because it is exactly the kind of planned economy measure which the New Dealers have been urging for years in time of peace, when there was no justification for it. Everyone who desires to maintain the system of private enterprise must be suspicious of the manner in which such a law will be administered, for once it is adopted, those in charge of the present administration are not likely to forget their desire to make it a permanent policy of our economy. I believe, therefore, that

the statute should make perfectly clear that it is an emergency measure, granted for a particular purpose, and to be administered with that purpose only in view, and not in an effort to socialize every industry in the United States. It should not be used to carry out theories of the equalization of wealth, or the reduction of normal profits, or any purpose except the prevention of inflation. The bill which has been presented certainly justifies some of the suspicions of its opponents.

First, that bill provides that its provisions shall only terminate upon the expiration of one year from the date of a declaration by the President, or the Congress by concurrent resolution, that the further continuance of the authority is not necessary. In other words, the act is almost the same as any permanent act, because it continues until further action by the President or Congress. It should be stated parenthetically that the constitutionality of the provision giving Congress the power to terminate the act by concurrent resolution is extremely doubtful. In my opinion the act should terminate on a specific date, say July 1, 1943, unless continued by Congress. That means that Congress must determine again in 1943, by positive legislation, whether the emergency still exists.

This is all the more important because the preamble, and the brief submitted in behalf of the bill by Mr. Henderson's attorney, suggest constitutional bases for price fixing which have no relation to the present emergency, and which attempt to justify the permanent power of fixing prices. Thus it is stated that one of the purposes of the bill is "to preserve the value of the national currency against the consequences of price and credit inflation." If Congress can fix retail prices, for instance, on the theory that it is thereby "regulating the value of money," then there is no longer any limit to the economic powers of the federal government, and nothing whatever left to the states. Another purpose stated is "to prevent economic disturbances and labor disputes which would result from unwarranted increases in prices, rents, and the cost of living," and still another is "to obtain the maximum necessary production without undue profits to low-cost producers." This suggests a complete socialization of industry, with a whole series of different prices for different producers, and no benefit whatever to the efficient producer by reason of his efficiency. In short, the preamble of the act, like a good many acts passed in recent years, covers everything except the kitchen stove. In my opinion it ought to be reduced to a very simple declaration of an emergency created by the preparation for war.

I believe the best basis for the present bill is the war power. Unquestionably a price-fixing statute could be based to a large extent on the power of Congress over interstate and foreign commerce, although it is questionable whether that could extend to retail prices and to the prices paid producers within a state. But if price fixing is ever to be undertaken in time of peace, it should be worked out on a peace basis and within the limitations of the commerce power. I do not believe that the power of Congress to regulate the value of money can be expanded through economic theories to include the fixing of prices all over the United States in millions of transactions. Nor do I think that prevention of strikes or the bolstering of the national morale provides a proper constitutional basis for price fixing in time of peace. If it did, we might as well forget local self-government and abolish the states altogether, for the same excuse could be used to justify any federal control of anything.

There is, of course, a question whether the war power can be exercised in time of peace. But the case of *Ashwander v. T.V.A.*, 297 U. S. 288, upheld the construction of the Wilson Dam under an act which was passed on June 3, 1916, before our entrance into the World War, in part at least under the war power. The Court said: "We may take judicial notice of the international situation at the time the Act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants, including the hydro-electric power plant, are, and were intended to be, adapted to the purposes of national defense." That case might be construed to authorize acts relating only to direct preparation for military action, but I have little doubt that the Supreme Court will uphold a general control of prices on September 1, 1941, under the war power. While Congress has not authorized a declaration of national emergency, it has recognized the existing conditions abroad and the possibility of war, by the passage of the Lease-Lend Act and by the appropriation of billions of dollars for defense. In fact, it is out of that very appropriation and the resulting expenditures that the present crisis grows.

If the bill is based clearly on the war power, then when the war is over it must come to an end, as it should. It will in the meantime eliminate all questions as to the constitutional power to control retail prices and intrastate prices.

Second. Another fundamental objection to the present bill relates to the fact that it confers price-fixing powers on the President of the United States. Of course it is obvious that he himself cannot exercise those powers. The bill, therefore, delegates to the President a power which Congress itself ought to exercise—the designation of the agency to do the job. Furthermore, the price-fixing process is merely one step in the general problem of dealing with inflation, and it should be made part of a general plan of inflation control. Today we have this control divided between the Treasury, the Federal Reserve Board, the Office of Production Management, Mr. Henderson, and many others. There is the same confusion which exists in the national defense program and in the housing program. The different officials of the government differ with each other, and often do so publicly. The fixing of prices in any industry is a matter of tremendous importance to that industry and to the public, requiring thorough consid-

eration and the presentation of all points of view. To permit one man like Leon Henderson to issue an order here and an order there, often without consultation with those concerned, often without consultation with other government departments, is dangerous and unsound. In my opinion Congress should create a National Board of Inflation Control, and clearly indicate what its powers are. I suggest that the board might be made up of an Assistant Secretary of the Treasury, a member of the Federal Reserve Board, the Administrator of Prices, a member of the Office of Production Management, an Assistant Secretary of Agriculture, a member of the Bituminous Coal Commission, and the Federal Loan Administrator. These seven men should devote their entire time to the work of the new board, but represent in a sense the department from which they come. In addition to price-fixing power, I believe that board should have power to exercise the priority power, after national defense needs are taken care of, and the allocation of materials between different manufacturers for non-defense purposes. They should have some power over credit. To that board should be given any additional powers which do not have directly to do with the defense program. The act should provide that before any price is fixed, the industry concerned have full opportunity to be heard before the entire board.

It may be objected that the action of such a board would be too slow, and that some prices may get out of control while the board is conducting hearings. This difficulty could be met by giving the board, or an administrator under the board, power to issue temporary orders, good for thirty days, until the board can act. Furthermore the board should be required to hold hearings at which all those who are affected shall be given the right to be heard. Hearings before an individual administrator, if he holds them at all, as Mr. Henderson does not, are likely to be a farce. His mind is already made up.

Third. The present bill is extremely broad in its definition of commodities. The word "commodity" is defined to include "services rendered in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales." I see no need for any such wide power. In fact, I think that the board should not be authorized to fix the price of any commodity until the President has made a special finding as to that particular commodity that such fixing is necessary in the national interest. This would at least suggest to the board that it should not undertake to regulate millions of transactions without adequate consideration. I doubt very much if it is necessary to include more than a limited number of commodities, those in which a shortage exists, and there is no necessity to extend the power to give control over the price of services.

It has been suggested that it is vain to control prices if wages are not controlled. Of course this would be true in the long run, but I doubt very much if it would be true over the course of a few years. Wages move slowly and are usually fixed for a year at a time. In the World War prices were successfully fixed, without the fixing of wages. The bill perhaps might give some general admonition to the Mediation Board that it is desirable to stabilize wages as far as possible in line with the action of the price-fixing board.

Fourth. With reference to the practical methods of price fixing, I believe the present bill emphasizes the wrong theory. It is based primarily on ceiling prices, for the manufacturer, for the wholesaler, and for the retailer. The most successful price fixing in the World War was done by the Food Administration. The central feature of that action was the fixing of prices at the central market or exchange, on basic commodities only, with the further establishment of various margins for manufacturing, wholesaling, and retailing. This process could perhaps be followed under the present bill, but certainly the present bill suggests an arbitrary fixing of prices, wholesale and retail, without much regard to cost or the tremendous variation in conditions which exists in different parts of the country. The word "ceiling" is a kind of newspaper word, and I believe the power should be spelled out more definitely in terms of the fixing of prices and margins.

I believe further that the suggestion of a direct regulation of profits should be eliminated from the bill, except as profits are indirectly affected by the prescribing of margins between buying and selling prices. The way to take care of profits is to tax them through the excess profits tax. If the price-fixing agency is going to concern itself with the persecution of everybody who seems to be making too much money, it is not going to have time to work out the tremendously complicated control necessary to regulate prices effectively.

Fifth. There are many other features of the present bill which I believe are open to objection, and no doubt the committees of Congress will consider carefully the various methods proposed for review and enforcement. I shudder at the idea of permitting the requirement of licenses, with the arbitrary power given to shut down a business if regulations are violated. I should prefer to rely solely on a criminal penalty to be prescribed by a court in accordance with the severity of the violation. The question whether we should control rentals, which as a rule have merely local effect and little effect on the national economy as a whole, should at least be considered.

Conclusion

With hesitation and distaste I have come to the conclusion that some form of price fixing is necessary. I believe, however, it should be a minimum power, confined to basic control, designed only to keep the general level of basic prices and the necessities of life from completely upsetting the economic level on which so many individuals and institutions depend for their existence.

THE CODE OF EVIDENCE PROPOSED BY THE AMERICAN LAW INSTITUTE

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I

UNDERLYING CONSIDERATIONS

A—The Nature of the Problem

One who is confronted with the task of drafting a code of evidence or of determining the advisability of adopting its provisions must face certain obvious facts as to the nature and purpose of a law-suit, as to the present condition of the law of evidence, as to the ineffectiveness of procedural devices to prevent perjury, and as to accepted notions of social policy affecting compulsory disclosure of information. A lawsuit is not a means of making a scientific investigation for the ascertainment of truth; it is a proceeding for the orderly settlement of a controversy between litigants. It usually involves an investigation of a dispute as to facts. The matter to be investigated is determined by the parties, who may eliminate many elements which a scientist would insist upon considering. Prompt decision is demanded, for justice delayed is often justice denied. Postponement of solution until satisfactory data can be discovered, produced and collated is often impossible. To fail to find for the moving party is ordinarily to find for his adversary. The tribunal for decision is composed of one or more persons, skilled in the law but not necessarily skilled in the field of human experience which the dispute concerns, acting either alone or with a body of men not necessarily trained in investigation of any kind. This tribunal must depend, for the most part, upon data presented by the contending parties; the rules governing the acceptable content of the data and the methods and forms of presenting them must be almost instantly applied in the heat and hurry of the trial. Consequently one must begin with a frank recognition that nicely accurate results cannot be expected; that society and the litigants must be content with a rather rough approximation of what a scientist might demand. One must realize also that in the settlement of disputes in a court room, as in all other experiences of individuals in our society, the emotions of the persons involved—litigants, counsel, witnesses, judge and jurors—will play a part. A trial cannot be a purely intellectual performance.

All this is not to say that the rules for conducting the investigation of the facts cannot be, or need not be, rational. Quite the contrary. In such a setting it is especially important that artificial barriers to logically persuasive data be removed. With such a tribunal acting in such circumstances the exercise of superlative psychological powers is not to be expected. Rules calling for nice intellectual discriminations and unusual intellectual and emotional controls are impossible of application. Speaking generally, the tribunal should hear and consider those data which reasonable men confronted with the necessity of acting in a matter of like importance in their everyday life would use in making up their minds what to do.

Present State of the Law of Evidence

No abstract of Mr. Wigmore's ten volumes, no collection of horrible examples is needed to demonstrate to lawyers that the existing law of evidence does not meet the requirements which these suggestions imply. The rules of evidence have been developed in myriads of cases, wherein the later judges have felt themselves bound by the doctrine of stare decisis to adhere to the pronouncements of their predecessors but bound also to avoid the absurdities which the simple application of these pronouncements would produce. In attempting to escape this dilemma they have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in haphazard fashion, one rule seeming to have no relation in reason to another. If an observer confines his view to a single compartment of the subject, he may not be shocked by the creature he finds therein; it may be curious but it will probably have some semblance of unity or uniformity. If, however, he breaks down the partitions between the compartments, he is amazed that anyone should contemplate turning into a single arena such diverse and antagonistic creatures. To put it in another way, the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century. Furthermore the rules of evidence have become so complicated as to invite comparison with those of equity pleading of which Story wrote that the ability to understand and apply them "requires various talents, vast learning, and a clearness and acuteness of perception, which belong only to very gifted minds." Happily, anachronistic systems of pleading have been discarded. Many a present day lawyer has only vague notions about forms of action and most of them have never visited the legal museum where dust covers new assignment, the replication *de injuria* and the *absque hoc* traverse. Obstructive devices in practice and the tactician's cherished privilege of concealing his real case for a surprise attack at the trial are slowly but

*On other occasions and in other legal periodicals I have written much—doubtless much too much—on many of the topics discussed in this article. Furthermore, I have written, and with the advice of the Chief Consultant, the Advisers, and the Council, have revised and rewritten many comments on various provisions of the proposed Code of Evidence. All of these I have used freely in preparing this article and have made no reference to any of the previous publications even where I have used identical phraseology.
[E. M. M.]

surely disappearing. It is time, too, for radical reformation of the law of evidence.

Fear of Perjury

Some of the deformities in that law are due to the obsession of early judges and of earlier and later legislators that perjury can be prevented by exclusionary rules. This was the notion back of the numerous common law rules which disqualified witnesses. It is the notion that is constantly urged against the expansion of exceptions to the hearsay rule. It exhibits itself in the curious decisions in some states that a witness may not testify to his own past or present state of mind. If there ever was a time when exclusionary rules prevented perjury, that time has long since passed. Given a litigant willing to commit or to suborn perjury, and complaisant counsel, no exclusionary rule will deter them. The witness will be competent; the testimony put into his mouth will comply with the strictest requirements of the law of the forum in which it is offered; he will swear up to the pertinent headnote. Only the honest litigant will be hurt; he alone will be deprived of the benefit of the persuasive evidence. No rational code will contain an exclusionary rule resting on its supposed efficacy to hinder or prevent false testimony.

Basis of Privileges

Neither fear of perjury nor distrust of the capacities of judicial tribunals has any pertinence to a consideration of the wisdom or propriety of creating or retaining privileges against disclosure of relevant data. Such a privilege suppresses valuable evidence to which the trier of fact is competent to give its proper weight. So serious an interference with a rational inquiry can be justified only by accompanying social benefits of high worth. A mere sentiment or an outgrown theory as to relative social values cannot serve as a determining factor. It must, however, be conceded that the harm done to the litigant and to society by refusing to uncover the facts in a particular lawsuit may sometimes be outweighed by the benefits inuring to society in general, under existing conditions, from preserving a confidential relationship or from affording protection against potential official oppression.

A code of evidence, therefore, should be adapted to the needs and capacities of the tribunal which is to apply it, should depend on other measures and devices to control the manufacture and use of false testimony, and should not be unduly influenced by the currently accepted rules, but must recognize that in some exceptional situations sound social policy may justify the deliberate suppression of the truth.

B—Judges and Jurors

As it is useless to attempt to frame rules of evidence or procedure as preventatives of perjury, so, too, it is futile to try to devise rules of evidence or procedure as means of producing satisfactory solutions of problems of fact from a tribunal assumed to be made up of medium or low grade morons presided over by a high grade moron. No legislative enactment, no rules of court can serve as a substitute for intelligence and integrity on the trial bench and in the jury box. That all this talk about the mediocrity or worse of the trial judges and the stupidity or worse of jurors has comparatively little foundation in fact can be discovered by a little cross-examination. How many lawyers had rather submit their cases to the trial examiners of the numerous administrative bodies than to a judge? How many cases involving huge sums of money and baffling problems are efficiently tried and justly decided in equity? As for the jury, subject to the guidance of the judge, how often would the judge's decision vary from that of the jury? Who would prefer an average trial examiner of the N.L.R.B., for example, to a jury, even without the guidance of the judge? And why so many objections to every proposed impingement upon the jury's classic functions? It may be conceded that under our constitutions, litigants may insist upon submitting to a jury problems which ordinary men are incompetent to solve, problems which a judge could solve only after study and with expert assistance. But no rule of evidence or procedure can cure this. Only a constitutional amendment can avail. Consequently, our code of evidence must assume a trial judge of reasonable ability and of unquestioned honesty. It must assume also a jury composed of men and women of ordinary intelligence.

Inconsistent Assumptions

It must not, however, as does the common law, assume jurors whose capacities are for some purposes abnormally small and for other purposes abnormally great. It is the height of folly to suppose that a juror cannot be trusted to give proper weight to a prior contradictory statement of a witness as evidence of the fact stated, but can be trusted to give it proper weight as evidence of the credibility of the witness. It is equally fatuous to expect a juror in an action by a plaintiff against a master and his servant to give to an admission of negligence by the servant its proper weight as evidence in determining his personal liability and to treat the admission as nonexistent in determining the master's vicarious liability for the servant's conduct. It is likewise useless to attempt to impose upon jurors the task of properly applying evidence which is relevant upon two distinct issues, but is inadmissible upon one and admissible upon the other. In each of these instances the exercise of extraordinary mental and emotional controls is required to make the proper application; the courts are fully aware that they are asking the impossible, but they are confronted with the dilemma of totally excluding the evidence or of admitting it for a limited purpose. The problem, unfortunately, arises in both jury and non-jury cases; and the only feasible solution is to admit the evidence. A code should, so far as possible, eliminate these absurdities. It should recognize the capacity of jurors to exercise the same measure of judgment and common sense which they are called upon to employ in their everyday affairs, and no more.

Control by Adversaries

One of the causes of the failure of the jury to give satisfactory service is the undue control over the trial which the adversaries have been given. It is well, no doubt, to require the adversaries to make clear the matters as to which they are at issue, for it is useless to consume the time and money of the state in investigating for the parties matters not in dispute between them. It is well enough also to require them to produce the data which will enable the agents of society to settle the dispute. The likelihood that the persons most interested in the outcome will take the necessary steps to discover and produce the available relevant data warrants this procedure. No doubt too a party must be given a fair opportunity to test and meet whatever is offered against him. All this, however, is a long way from saying that witnesses produced by a party are his witnesses, his little champions; or that all the evidence received must be from percipient witnesses subject to cross-examination concerning the matter perceived, and that no secondary evidence can be admitted. It is still farther from saying that the trial is to be a battle between the great champions of the contending parties; a battle of wits between their lawyers with the judge as umpire and the jury making the decision without advice from the judge.

The Code, then, must recognize the merits of the adversary system but must discountenance its excesses. It must assume a competent judge in control of the trial and a jury of ordinary intelligence entitled to receive and receiving the aid and supervision of the judge.

C—Admissibility of Relevant Evidence

How much weight shall be given to evidence is a question of judgment incapable of *a priori* determination. The Anglo-American law has, as Professor Thayer has said, no mandate to the logical faculty. It does, in a few instances, refuse to receive one class of evidence where an obviously better one is available; but it always concerns itself with admissibility as distinguished from weight. In any rational inquiry, logically irrelevant evidence is excluded, and in judicial inquiries some logically relevant material may be either absolutely or conditionally rejected. A code of evidence should concern itself primarily with admissibility, and in this respect it should be complete in itself. Consequently it should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule.

Procedural Rules Affecting Evidence

There are some procedural rules governing the time and manner of presenting and objecting to evidence, the necessity of presenting it, and the effect of erroneous rulings in the process. If the common law is to control in respect to these, much of the benefit to be derived from changed rules of evidence will be lost. Consequently the Code must make specifically applicable to these procedural matters the principles embodied in the New Rules of Federal Procedure. In addition, the utter confusion in the law as to Presumptions must be dissipated and a simple, workable solution provided; the subject of Judicial Notice should be clarified and brought into harmony with modern conditions.

Theory of Drafting Code

In attempting to frame the necessary provisions to these ends, several courses are open. The first is to canvass all the situations in which pertinent questions have been answered by the courts and to devise a mandate to the trial judge for each such case. This alone would not suffice, for obviously no draftsman or body of draftsmen, be they ever so wise and ever so ingenious, could possibly foresee all the new situations or all the variations of old situations which will be presented in the future. Each generalization would have to serve as the base for an elaborate superstructure of specifications and qualifications. To adopt such a method would be to produce a long, unwieldly enactment which would be in effect a restatement of the law of evidence similar to the restatements of the substantive subjects. Another course is to frame a very few, very broad general principles, and direct the trial judge to apply them. This would serve a useful purpose only in case the decision of the trial judge is to be final and not subject to review. Otherwise each application of the general principle to a new situation would invite appeal. The third method is to draw a series of rules in general terms covering the larger divisions and subdivisions of the subject without attempting to frame rules of thumb for specific situations and to make the trial judge's rulings reviewable for abuse of discretion. This leaves to the trial judge much room for the exercise of a sound judgment; it does not hamper him with detailed restrictions, and tends to discourage useless appeals. The third plan has been adopted in drafting the proposed Code.

II

APPLICATION OF THESE CONSIDERATIONS IN THE CODE

Discretion of Trial Judge

The proposed Code leaves no room for doubt as to the power of the trial judge. His historic role as master of the trial is restored. He has complete control of the conduct of the trial. By Rule 3 he can ascertain whether the matter to prove which questioned evidence is offered is *bona fide* in dispute; if not, no exclusionary rule is to be applied. Under Rule 105 he is to see to it that the evidence is presented honestly, expeditiously and in such form as to be readily understood: to this end he regulates in his discretion such matters as the order in which evidence is to be offered and witnesses are to be called, the number of witnesses to be called for a single item, the conduct of counsel in examining witnesses, the

manner and scope of examination and cross-examination, the use of leading questions, of memoranda to refresh recollection, and of maps, models, diagrams, summaries and other devices for making testimony readily understandable, and the production of available documents on demand. And he may of his own motion exclude evidence which would be inadmissible if a proper objection were made or a proper claim of privilege were interposed. Whenever the admissibility of evidence or the existence of a privilege depends upon the existence of a disputed fact, he determines whether the fact exists for the purpose of deciding whether the evidence may be received or the claim of privilege allowed. With the admissibility of the questioned evidence the jury has nothing to do. If admitted, the jury must give it consideration with the other evidence; its weight is for them. In Chapter VI the judge is authorized to appoint expert witnesses and to see to it that they perform their functions efficiently. In various places, he is expressly directed to exercise his discretion, e.g., in Rule 618, to exclude certain documentary evidence unless the adversary has been furnished copies; and in Rule 1002, to take judicial knowledge of specified matters. The general language in which the Rules are drawn gives wide scope for the exercise by him of an honest judgment in the circumstances of the particular case. For example, Rule 702 makes no enumeration of the specific situations which furnish a justification for the introduction of secondary evidence of the content of a writing. All the judge need find is that the original is unavailable for some reason other than the culpable negligence or wrongdoing of the proponent, or that it would be unfair or inexpedient to require him to produce the original; Rule 403 is the keystone of the arch, for it authorizes the judge to exclude otherwise admissible evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or confusion of issues, or (c) unfairly surprise a party who had not reasonable ground to anticipate that the evidence would be offered. This gives the judge ample control over evidence of comparatively slight probative value, and tempers all of the other rules under which such evidence may be admissible. Finally, the judge may by Rule 8 comment on the weight of the evidence and the credibility of the witnesses; and by Rules 6 and 7 no reversal can be ordered for error in the admission or exclusion of evidence unless the reviewing court believes that a proper ruling would probably have had a substantial influence in producing a different result. Thus there runs through the whole Code the theory that the trial judge directs and controls the conduct of the trial, and that his action is final except where an abuse of his discretion results in material prejudice to the substantial rights of the losing litigant.

Limitations upon Control by Parties

This, of course, carries as a corollary a limitation upon the influence of the adversary theory of litigation. Rule 702 which requires the production of an original writing is designed to protect the adversary from suppression of the best evidence in cases where mistakes or deliberate misrepresentations are likely to occur and to be especially harmful. The Rules governing the reception of personal, authorized and adoptive admissions, like the common law, make admissible some evidence of questionable value, but the adversary may meet or explain it, and both counsel and judge may comment on its weight. The doctrine of vicarious admissions by joint-owners, joint-obligors and predecessors in interest as developed in some courts carries the adversary theory to unreasonable extremes, and is limited in the Code. In like manner, in so far as the hearsay rule reflects that theory, the Code provisions liberalizing the common law rules, modify its effect. And the common law rule which forbids a party to impeach his own witness is entirely abrogated.

This control of the judge with the accompanying limitations upon the adversary theory makes the trial a rational investigative proceeding and lessens the dangers of confusing and misleading the jury. It consequently justifies submitting to the jury almost all relevant evidence which is not subject to exclusion on the ground of privilege.

[*To be continued*]

The Trial of Socrates, B.C. 399

[*The following account of the famous trial of Socrates is from "Historical Trials" by Sir John Macdonnell, edited by R. W. Lee and published at Oxford, 1927. We have taken it from Wigmore's "A Kaleidoscope of Justice" recently published by Washington Law Book Company. Ed.*]

"At the actual trial the course of procedure was this: First, the prosecutors spoke, in this case, all three, each probably taking a different line. Then came the witnesses. Who they were and what precisely they said is unknown. We may conjecture what was the line of attack of the prosecution; it is probably to be inferred from the reply, assuming that *Plato's Apology* records accurately the real speech of the accused.

"I need scarcely remind you of the character of the defense. It is manly and uncompromising. . . . Socrates seeks first to remove the weight of prejudice against him, the attacks of his old enemies, going back to the time of [Aristophanes' play of] *The Clouds*. He examines the origin of this prejudice. He finds it in this:

> 'I go about the world obedient to the god, and search and make enquiry into the wisdom of any one, whether citizen or stranger, who appears to be wise; and if he is not wise, then in vindication of the oracle I show him that he is not wise; and my occupation quite absorbs me, and I have no time to give either to any public matter of interest or to any concern of my own, but I am in utter poverty by reason of my devotion to the god.'"

LORD HALIFAX SPEAKS TO THE BAR*

IT is a great pleasure to be the guest of the Federal Bar Association, even if that pleasure has been mingled with some apprehension at meeting so many representatives of the legal profession. Lawyers as a race are people whom I have always held in considerable respect; such respect, indeed, that I have always wished to keep them at a distance. The further I was away the safer I felt.

A friend of mine high in the legal profession in England once told me that a friend of his, even higher, had said to him, "When I was young at the bar, I lost a lot of cases I ought to have won. After I got older, I won a lot of cases I ought to have lost. Substantial justice, therefore, had been done." That attitude of mind is typical of the legal profession as a whole and shows what broad-minded views lawyers can sometimes take.

But one special reason for pleasure at being your guest is the fact that your society so definitely represents one side in this stupendous struggle in which we are now engaged.

Those who stand for the law are today the lineal descendants of innumerable men renowned in their generation who have realised what the development of law has meant to human society.

All human progress has depended upon the conception of law between nations, between the State and the individual, and between individuals. And law has been the means by which respect has been secured for the pledged word, security has been given against injustice, and liberty has been protected.

No society, national or international, can possibly exist if no value attaches to the pledged word. Life indeed always proceeds on the basis of probability rather than of certainty, and it is by assurances and undertakings that we attempt to reinforce this basis of probability. Without this, life speedily reverts to the jungle in which men live in perpetual fear, much as the untutored tribesmen of the northwest frontier of India used to live, and live still in some parts today.

To protect liberty and to secure men against injustice has been the object of the great constitutional instruments which have made your history and ours—Magna Carta—Habeas Corpus—Declaration of Independence—Bill of Rights—and, in the sphere of legislation, the great Reform Bill in England, passed, I am glad to think, by my great grandfather, Lord Grey, and the passing of which my own grandfather, then a member of the House of Commons, was able to announce to the crowded House had been by one vote—302 to 301.

We have constantly seen, therefore, three stages in this long process. First, the assertion by the State of the main principles which it deemed important; second, the development of practical machinery for giving effect to them, such as, for example, the development of trial by jury; and thirdly, the protection of these principles by the courts.

It is interesting to observe the different methods by which you and we have sought to restrict the Executive from interfering with the Legislature and with the Judiciary.

We have followed different plans, which I do not here discuss, but one matter may be of interest, and is not perhaps generally known, either here or in England. On each occasion of the Opening of Parliament, after the King's Speech has been formally read, each House meets again later in the day, and the Lord Chancellor and the Speaker respectively, "having," as the phrase goes, "for the sake of greater accuracy secured a copy," read the Royal speech again. But before they do this in each House, the Leader rises and asks leave to introduce a Bill concerning either "Select Vestries" (whatever they are!) or "Outlaws," in order to assert the right of Parliament to legislate apart from the permission given in the speech.

As a result of this development we have both learnt that law and liberty are opposite sides of the same coin, and that neither will long exist without the other.

It has been natural therefore that we should have been led on from law to liberty, and that as the idea of liberty has grown, so law has more and more come to be the outward and visible expression of the common social thought and conscience of the nation.

On these twin foundations the United States and the British Commonwealth of Nations have both tried to find the right balance between the individual and the State, and have both stood for the same standards between States. Both still have work to do. We, having learnt the lesson that you taught us in 1776, have realized that freedom is the true foundation, not of uniformity, but of unity. That process is complete in our Dominions, is still in course of development in the Crown Colonies, and most of all is taking shape in the great dependency of India.

I would have you keep certain broad facts in mind when people speak of India. A total population of three hundred and fifty millions, of which roughly one quarter is included in the Indian States.

Of the balance in British India one hundred and seventy-seven millions roughly are Hindus, and nearly seventy million Moslems.

British India itself is divided into eleven Provinces, some the size of France, under Indian Ministers, presided over by an Indian Prime Minister, to whom are entrusted all internal affairs of the Province, including

*Address by the British Ambassador, Lord Halifax, before the Federal Bar Association, Washington, June 16, 1941.

justice, police, education, health, irrigation, agriculture and so on. These Ministers are responsible to the legislature and to the electorate, subject only to certain safeguards in the hands of the Governor, for the maintenance of peace in grave emergency and for the protection of minorities.

The difficulty of full responsible government at the centre is therefore twofold. Firstly, that it necessarily implies control by British Indian politicians of all-India matters, such as tariffs, communications and central finance, in which the Indian States are as closely interested as the British Indian Provinces. Here clearly the solution must be that incorporated in the government of India Act, 1935; namely federation, under certain safeguards for the efficient maintenance of defense and conduct of foreign policy.

The second difficulty arising in the centre is the distribution of power between Hindus and Moslems, and that problem can only be solved by agreement of the great communities, which is not yet forthcoming.

But I hope I have said enough to show that our purpose in India is to work for a United States of India, free to manage its own affairs, and based on the agreement of its several component parts, British India and the States, Hindus and Moslems. We shall do whatever we can to achieve this end, for just as the aeroplane is built for the air, the racehorse to gallop, the cow to give milk, so the Anglo-Saxon race can work for no other end than that of liberty. Nor do either you or we understand any purpose or treatment of policy except interpreted in terms of freedom.

We have often asked ourselves what is the mental picture that we see when we think of England. Is it some familiar country scene of which we have memories, or is it some great industrial district such as Sheffield and the West Riding of Yorkshire, or does it come to us in terms of persons or long forgotten impressions of a happier past? For some it will have meant one or all of these things. But today I venture to think that when we think of England, we think rather of the personification in one unit of the single will of forty million people for the defense of liberty. And it is because we know that the moral values which have brought us to this conclusion are yours no less than ours, and because we know that, holding this faith, you are giving us in ever increasing volume the material means necessary to secure victory, we are supremely confident of the issue of this grim contest with which the world is now being torn.

The United States Court for China

By HON. MILTON J. HELMICK

Judge, United States Court for China

[*The author of the following article has been Judge of the United States Court for China for several years. He has had a distinguished career, for in addition to the interesting and important post which he now holds, he served for some years as Attorney General of New Mexico. Secretary of State, Cordell Hull, has recently announced that the United States would consider surrendering its long-standing extraterritorial rights in China, provided other nations would do likewise, and provided that China wished such action taken. More recently still, China has announced its appreciation of Secretary Hull's statement, and its hope that such a result may be achieved. The following article is therefore most timely. Ed.*]

SOMEWHERE on the rolls of duly licensed lawyers in the United States there may be the name of a man with sufficient qualifications to be judge of the United States Court for China but if he were discovered and brought to bay he would surely prove too sagacious to take the job. He would be expected to preside over a court of supposedly limited but virtually general jurisdiction in law and equity, besides statutory proceedings under general Acts of Congress and those applicable to the District of Columbia, crimes, probate, juvenile court and appeals from consular courts. For ordinary everyday judging he should know all the substantive law there is on any subject, federal procedure and practice, state court methods and function, all about extraterritoriality, a little international law, a smattering of the laws of other countries, something of Chinese law, a great deal about China in its bewildering mass, a lot about international politics, considerable about diplomatic usages, a bit of anthropology and a modicum about bomb-dodging. Curiously, he need not know that elusive thing called the Chinese language. Additional desirable qualifications of a less tangible nature may be summed up as high and crafty ability for broken field running on behalf of the team representing substantial justice.

It is not the purpose of this article to give a technical review of the origin, jurisdiction and function of the United States Court for China. That job has been well done several times and for an excellent and comprehensive discussion the reader is referred to Prof. Willoughby's *Foreign Rights and Interests in China* and especially to Chapter XXII on Extraterritoriality in China, Chapter XXIII on Extraterritorial Courts in China and Chapter XXIV on The Law Applied in Extraterritorial Courts. The instant article is written sans

footnotes with a minimum of citation, simply to tell something of the actual work of the court in practical everyday operation.

The Court in Operation

It is of course essential to note a few basic things. The court exists by virtue of century-old treaties between the United States and China whereby the latter accorded extraterritorial rights to Americans in China. Some of the other nations enjoying extraterritorial rights are Great Britain, France, Italy, Japan, Belgium, Switzerland, Norway, Brazil, Denmark, and Sweden. On the other hand, Germany, Austria, Hungary and Russia lost theirs as a result of the last world war, and consequently their citizens are subject to the laws and courts of China. The effect of extraterritoriality is to subject the foreigner enjoying the privilege to the laws of his own country instead of the laws of China.

After the treaties and until the creation of the United States Court for China in 1906, American judicial function was vested in the consuls of the United States stationed throughout China and most nations enjoying extraterritorial rights today still employ a similar system. France and Italy have specialized judges and court staffs within the consular set-up but only the United States and Great Britain have separate autonomous courts.

The act creating the court gave it jurisdiction "in all cases and judicial proceedings whereof jurisdiction" was exercised prior thereto by consuls and ministers. For good measure the act further provided that where "the treaties and the laws of the United States now in force with reference to consular courts . . . are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied."

The jury system does not obtain in the United States Court for China and even a capital offence is tried by the judge alone. On the familiar theory that the constitution does not follow the flag, jury trials have not been considered essential in an extraterritorial jurisdiction and in the case of *In re Ross,* 140 U. S. 479 the Supreme Court of the United States specifically so decided. Except for absence of jury trials, the Bill of Rights is otherwise scrupulously respected as a matter of primary American principle and legal policy. The British court maintains the customary jury system using six-men juries.

Personnel of Court

In setting up the United States Court for China, Congress doubtless intended to create something in the image of a federal district court and provided for a district attorney, marshal, clerk—all appointed by the President, and a commissioner. The commissioner is only for Shanghai, and he acts as ex-officio judge of the consular court in that place. The headquarters of the court are at Shanghai, but the court has to cover the whole Republic of China and the statute provides that yearly sessions shall be held at Tientsin, Canton and Hankow, and that the court may sit in any other place in China where there is an American Consulate if business requires. The provision for annual sessions in the three cities mentioned is considered directory instead of mandatory and in recent years no sessions have been held at Hankow although regular trips have been made to Tientsin and Canton. The bulk of the business is in Shanghai, although there is usually a fair-sized docket at Tientsin.

Business of the Court

A volume of light reading could be written about the strange and amusing things which pass through the court. No case, it seems, is ever routine and even the procurement of a default judgment on a promissory note will surely develop some queer angle. Frequently the court room looks like a picture-book oriental scene by reason of the costumes and language of the litigants, witnesses and spectators; but an earnest and almost pathetic effort is made to retain the atmosphere and practice of a "homeside" court, although constant concessions have to be made to local conditions and customs. The court employs a full time Chinese interpreter who is not a classicist but a practical linguist who can grapple with Shanghai dialect, mandarin, Cantonese and various provincial dialects. The court can rarely act *stricto jure.* The Chinese widow of a coolie who has been killed by an American motorist may want to bring action for the death of her husband, but the District of Columbia Death by Wrongful Act statute vests the action in an administrator and Chinese courts do not appoint administrators where there is neither property nor dispute among the family. So the Chinese widow brings into court only a little red paper with some black scratches on it which the other members of the family have given her and then the court says everything is all right and she can be a plaintiff.

What the Spectator Sees

The stranger sitting as a spectator at a trial will be bewildered by the use of strange terms and unintelligible references although the meanings and connotations are perfectly clear to the lawyers, litigants, witnesses and judge. The spectator will hear the terms "compradore," "key-money," "Pootung-side," "extra-settlement road," "godown warrant," and many others which attorneys rarely take the trouble to explain on the record so that they would be plain to an appellate court. However, in a recent trial in a war risk insurance case the attorneys attempted to make the record clear on all localisms because it was supposed the case would be appealed whatever the decision. The time and effort required nearly exhausted everybody. When a Chinese witness said he "had to cross the Garden Bridge" the implications were instantly apparent to everyone in the court room, but much testimony and even exhibits were required

to explain them on the record. The reader may visualize "crossing the Garden Bridge" in pictures of a lovely lily pond, a graceful arched span and gilded pagodas, but the people in the court room knew the bridge is an ugly iron thing over the smelly Soochow Creek between that portion of the International Settlement which is in the defense sectors of the American Marines, British forces and Shanghai Volunteer Corps, and that portion which the Japanese forces occupy; that both sides of the creek are within the International Settlement where the municipal authorities function but to a lesser extent in the one than in the other; that Westerners may cross the bridge with comparative freedom but Chinese must undergo inspection or at least scrutiny and must uncover and bow to the Japanese sentry; that at various times passes may or may not be required for trucks to cross, etc. The term "extra-settlement road" would require pages to explain. The term "compradore" denotes a Chinese agent-manager connected with a foreign business firm in a relationship entailing duties, liabilities and privileges which simply cannot be expressed in Anglo-American legal terminology.

Conflicting Jurisdictions

Problems arising from jurisdiction over persons, which is limited to American citizens, intrude in every phase of the court's work. A non-American witness cannot be made to answer questions because the court has no power to punish him for contempt. In one important case of unusual public interest several non-American expert witnesses brought their consular officers to sit beside them on the witness stand and advise them what questions they should or should not answer. It was done courteously but firmly. A non-American whose interest in the subject matter of litigation is suggested, cannot be brought in as a party unwillingly by the process of the court.

Foreign Settlements and Concessions

There is much misconception about foreign settlements and concessions and many people in America seem to think they limit or affect the court's jurisdiction in some manner. On the contrary, settlements and concessions have nothing to do with extraterritoriality although both represent the same sort of political subserviency which China has permitted. The writ of the United States court runs in the French concession at Shanghai and in the various concessions at Tientsin and other places the same as in China at large, and the court's jurisdiction is the same inside and outside the various settlements and concessions. In Tientsin and Canton the court sits in American consulates which are located in the British concessions. Settlements and concessions are foreign administrative entities but their soil is the soil of China, and necessarily there are no municipal courts. Municipal ordinances and local regulations are enforced against Americans by the United States Court for China and the American consular courts throughout China as a matter of public policy in the obvious interest of fairness and good order so long as the local regulations do not offend American law and are not prejudicial to American rights, although it is hard to find any legal basis for including local regulations within the body of law extended to the court. The United States Commissioner at Shanghai holds traffic court every Friday morning for American motorists charged with violating regulations of the International Settlement, the French concession or the outside municipal area, but he can ordinarily manage to fit the offense under some section of the District of Columbia traffic provisions if he cares to take the trouble.

American Bar in China

There are about 20 members of the American Bar in Shanghai and 4 in Tientsin. Most of them are "old China hands" who have practised in the United States court for many years and it is interesting to observe how typical of the American legal fraternity they remain in spite of long residence abroad. The admission and discipline of attorneys is regulated by rule of court. One who has never been admitted in the United States may, if he is a graduate of a recognized law school, be admitted to practise in the United States Court for China on passing a complete and conventional bar examination given by the bar examining board of the court. Those coming from the United States with credentials may be admitted after passing an examination on the one subject of extraterritoriality. A non-American lawyer under court rules may appear and plead in the court by courtesy extended in each case if his own national court extends a reciprocal privilege to American lawyers. The Ninth Circuit Court of Appeals has held that a mixed partnership (one between an American and a non-American) for the practice of law, is not contrary to public policy in the China jurisdiction. However, no mixed partnerships exist.

Future of the Court

The future of the court is in the laps of the Gods, or rather the statesmen who direct the destinies of nations and continents, and the fate of the court will be determined by America's position and attitude in China after peace has finally come to Asia. It is inevitable, of course, that extraterritoriality must go. In spite of war conditions, the Chinese are training many lawyers and are making great efforts to build up and maintain a modern judicial system. In the past Continental legal advisors have turned China toward a Continental code basis of law but there are increasing indications that in the future China will be likely to veer more and more toward the Anglo-American conception. In the meantime the United States Court carries on and the judicial branch of the United States government operates on the Yangtsze the same as on the Potomac—not exactly the same maybe, but at least in the best approximation the United States Court for China can manage to achieve considering what it is up against.

MR. TOMPKINS RESTATES THE LAW

By HON. HERBERT F. GOODRICH

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THE Supreme Court decision in Erie Railroad v. Tompkins[1] and the American Law Institute's Restatement of the Law seem at first thought to have nothing to do with each other, however important each may be by itself. Nevertheless, the two do have significance together and the writer hopes to demonstrate that fact in this short discussion. The significance is greatest for the federal judge and for the lawyer who practices in federal courts, but the point which lies back of it has importance for state as well as federal jurisprudence.

Erie Railroad v. Tompkins is one of those leading cases which one learns to cite by name. It has called forth a welter of essays, notes and comments, many of them very good. That straw need not be threshed over. Federal courts are now required to look to state decisions on matters of state law; there is no longer to be an independent federal doctrine of "general commercial law." Thus we have, through this leading case and the new federal rules, a reversal of the old form; the federal court now gets its state substantive law from the state decisions and its adjective law from rules of federal procedure, whether it sits in Wisconsin or Delaware. There are still many unsettled questions which are not raised in Erie Railroad v. Tompkins. But one thing is clear, and that is the Supreme Court decisions which follow show a clear tendency to extend and not curtail its effect. Federal courts are to follow state decisions even when the latter are from intermediate courts and not final authority.[2] A federal judge, in a diversity of citizenship case, decides the conflict of laws questions involving the application of the law of another state in accordance with the local rules of the conflict of laws.[3] He is even subject to the local notions of domestic policy in such cases.[4]

Lawyers and judges have their own notions about the desirability of all this. Some federal judges do not like it. It limits their scope of freedom of decision and it also, ad hoc, makes them subordinate to a state court.[5] But surely it is good general policy that a suitor's rights and liabilities should not vary from court to court. Wholly fortuitous circumstances which give the federal court jurisdiction, although the question involved is purely one of state law, should not make a difference in substantive rights. The present trend in the decisions supports this general policy strongly.

It is well enough to say that a federal judge shall look to state sources for state law. If there is a statute, it continues to govern, as it always has. Erie Railroad v. Tompkins did not give us anything new on that. But assume that no statute settles the point of state law. The question presented is the common law of a state. It may be that the "internal" law of the state in which the court sits controls or it may be that the law of another state must be referred to, for a case before the federal judge on diversity of citizenship often involves facts occurring across state lines. In either event, the federal judge takes judicial notice, in this type of case, of the laws of other states of the United States.[6] If the law of another state is involved, the federal judge makes the same reference to it as would a state judge in the same type of case. And if counsel see their problem in the same way as the judge must see it, they will give him some help in locating appropriate references to the law of whatever state is involved. But members of the bar whose practice concerns mostly local transactions are not always alert to the conflict of laws questions involved in a two-state case. Still less are the implications of Erie Railroad v. Tompkins to the federal judge's two-state problem understood. Frequently the judge may have to go it alone.

The first reference is undoubtedly to the statutes and the reported decisions of the state whose law is involved. It is evident that federal judges are going to have to do more searching in state digests and in reports of state decisions than they have ever had to do before; and that federal court libraries have got to have something more in them than Supreme Court reports, Federal Reporter and U.S.C.A. If an authoritative local decision is found which governs the case, the judge may breathe a sigh of relief. Whatever he may think of the local decision, it governs the instant case for him and all he needs to do is apply it. But the surprising thing to discover is how many gaps there are in the judge-made legal fabric in any state.

These gaps we learned about in an interesting experiment which was made in connection with the American Law Institute's work. The Institute had completed its Restatement in Contracts, Agency, Conflict of Laws, Trusts, a part of Torts and a portion of the work in

1. 304 U. S. 64 (1938).
2. West v. American T. & T. Co., 311 U. S. 223 (1940); Fidelity Union Trust Co. v. Field, 311 U. S. 169 (1940); Six Companies v. Highway Dist., 311 U. S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940).
3. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 61 S. Ct. 1020 (1941); Miller v. Needham, C.C.A. 3d, June 17, 1941.
4. Griffin v. McCoach, 61 S. Ct. 1023 (1941).
5. An extreme illustration is seen in Vandenbark v. Owens-Illinois Co., 311 U. S. 538 (1941) where a federal court following a decision of the highest state court was reversed because, after its ruling, the state court reversed itself.
6. Owings v. Hull, 34 U. S. 397 (1835); Lamar v. Micou, 114 U. S. 218 (1885); Hanley v. Donoghue, 116 U. S. 1 (1885); Wigmore on Evidence, 3d Ed., § 2573; 3 Beale, The Conflict of Laws, § 624.1; Goodrich on Conflict of Laws, 2d Ed. 1938, § 80. This rule as to judicial notice is not affected by Erie Railroad v. Tompkins. Gallup v. Caldwell, 120 F. (2d) 90 (C.C.A. 3, 1941).

Property. The Restatements had been based on case law but not the case law of any one individual state or group of states.

The Institute had endeavored to express the American law taken as a whole and, of course, where there was a division of case authority on a given point, the choice of one of the conflicting views had to be made. Several years after the work on Restatement had begun the Institute requested the cooperation of Bar Associations, Law Schools and interested individuals in making local studies in which the state decisions in the individual state were compared with the Restatement. Annotations resulting from such studies are to assist the user of the Restatement by giving him the picture of his local law against the background of the general American view as shown in the Restatement. They show the reader whether local authorities are in accord with the Restatement, or contrary to it, or doubtful, and, finally, whether there is no local authority. This last question is the significant one for the moment.

Based on an examination of 80 different volumes of state annotations in the various subjects we come out with the result shown in the following table:

Subject	*No Local Authority*	*Subject*	*No Local Authority*
Agency	38.5%	Property	49.2%
Conflict of Laws	47. %	Torts	46.4%
Contracts	26.4%	Trusts	37.1%

The breakdown of this composite total in the different subjects from state to state, will, of course, show considerable variation. In a commercial subject like Contracts one would expect to find the law pretty well settled, at least in the older states. Yet even here, Florida has no local authority in 39% of the propositions enunciated in the Restatement of Contracts. Mississippi has none in 44%. Pennsylvania has left unanswered, as yet, 22.3%. In New York the percentage of no local authority in this subject drops to 6.4. In the law of Agency, Indiana has no local authority in 41% of the sections in the Restatement of Agency; Georgia has none in 36.5%. Perhaps the gap which somehow must be bridged is best shown in the figures concerning the Restatement of Conflict of Laws, where points, until recently, have not been litigated as frequently as in Contracts or Agency.

Analysis of a group of annotations in the field of Conflict of Laws showed absence of local authority as set forth in the following table:

State	*No Local Authority*	*State*	*No Local Authority*
Alabama	50.7%	Mississippi	59.8%
California	30.9%	Missouri	37.4%
Colorado	48.2%	New York	20.1%
Illinois	46.1%	Oklahoma	42.9%
Indiana	56.1%	Pennsylvania	23.4%
Iowa	50.8%	Rhode Island	50.3%
Louisiana	36.4%	Tennessee	73. %
Maryland	45.7%	Texas	60.4%
Massachusetts	50. %	West Virginia	44.3%
Minnesota	62.3%	Wisconsin	51. %

These figures are highly significant. The federal judge under Erie Railroad v. Tompkins must refer state questions to state law, and state questions include those questions concerning reference to the application of the laws of other states. Yet when the federal judge turns to see what his rule refers to, he finds no answer in 50% of the propositions included by the Restatement. Of course, that does not mean he will find no answer in 50% of the cases which come before him. The more common ones will have come up and been settled in a state even where legal history is short. Nevertheless there will be many gaps and very important gaps in the case law of the state which the federal judge is bound to follow.

It is quite obvious that if there is a work to which he can turn which will give him a presumptively correct statement of state law in the absence of controlling local decision, that work will be a very valuable one indeed. In a later article an account of the reception of the Restatement by the courts will be given to show that the Restatement is sufficiently authoritative to bridge the gap. It is enough for now to say that up to April 25, 1941, the Supreme Court of the United States has cited the Restatement 38 times and other federal courts have cited it 885 times.

Aristotle's Concept of Justice

"Following the method of learning about justice from its contrary, Aristotle gives three ways in which a man may come to be called unjust: 1. By breaking the law; 2. By being avaricious; 3. By desiring to have less than his proper share of what is evil. Aristotle says:

" 'The good man makes good use of poverty and sickness and other injuries of fortune; but what is able to bring happiness is of a contrary sort. . . .'

"St. Thomas Aquinas (in commenting on Aristotle) says that this idea of injustice is more correctly called inequality, since inequality appears in attempting to have both more of good and less of evil . . . .

"In the third book of the Politics Aristotle shows that it is not the same thing to be a good man merely and to be a good citizen under any form of government. For there are certain forms of government not on good principles. In them a man may be a good citizen though not a good man. But under the best form of government, no one is a good citizen who is not a good man."

Allan H. Gilbert, Professor of English, in Duke University in "Dante's Conception of Justice," 1925.

BOOK REVIEWS

HOLMES-POLLOCK LETTERS: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932, edited by Mark De Wolfe Howe. 2 vols. 1941. Harvard University Press. Pp. XXII, 287, and VIII, 362.

Most men learn but to forget, to learn and forget again. Dying, they are themselves forgotten. A few men, natural historians, grow by what their thoughts feed on. Marching they remember and remembering march on. Learning the lessons of literature and history, they live by them. Dead, they live in history. Our profession is notable for producing such men. Of modern examples, Holmes and Pollock are perhaps its most, certainly among its most, notable. No eleventh hour workers, both came early into, both worked late in, the vineyards of the law. Trimming and pruning, cultivating here and spraying there, both brought good ripe legal grapes to market. Pollock, ambitious, versatile, insatiable, indefatigable, was prodigious in output. Holmes, fond of conversation and of letters, supersensitive to the wordiness and the dullness of the usual formal written word, aside from his opinions wrote little for publication. But, master of English prose, that little was priceless. Both were steeped in, and almost schoolboyishly fond and proud of their knowledge of, the classics, Pollock was the greater scholar. None knew this better than Holmes, none more readily or fondly conceded it. Both were experts in legal thinking and in the more general field of learning and literature. Holmes in these letters, as in his other writings, seems to me always the expert amateur, Pollock always the expert professional.

As these letters show, the intellectual gaze of each not at all, and never, foreshortened by any particular advocacy or pride of opinion, was always comprehensive, luminous and clear. Seeing past, present and future whole, with eye unhooded to the light of truth, the level gaze of each, viewing with like equanimity all of its portents, fearful as well as pleasing, took the whole prospect in.

To those who knew them, or, not knowing them, knew something of their life and works, their correspondence will prove a wonderful sourcebook for checking and comparison. For, objective enough to furnish a spirited and moving commentary on their times, while recording and revealing an almost perfect epistolary friendship, these letters are subjective enough to throw a flood of intimate and revealing light on the spiritual equipment of each for his long and useful life, on what each thought he was doing, and why he did it. For they are concerned not merely nor even mainly with a discussion of legal questions, a statement of legal views. Taken as a whole, especially beginning with those written in the nineties after each had reached mid-life, and increasingly thereafter, the letters are not so much concerned with law as a science or an art. Mirroring the moving stream of the times as it was reflected in their own experiences and in their reactions to the experiences of others, they are concerned with law as with everything else they touch on as a part of the larger scene of history, literature and life. They thus present, sometimes it seems to me with a little child-like, but always forgivable pedantry, a charming picture of the reading, the thinking, the feeling, the way of life of these, our elder brothers in the house of law, as they passed through life with its honors, its triumphs, and its tribulations, as teacher, lawyer, judge.

While they differed in some respects, these two, perhaps their only substantial difference was in their fundamental approach to, and their understanding of, the source and basis of law and of its place in the scheme and nature of things. Holmes, no natural law man, was a sceptic; Pollock, a natural law man, was a man of simple faith. But, as their correspondence shows, this difference notwithstanding, they were fundamentally alike in their personal understanding and tolerance of the viewpoint of each other, in their social and intellectual approach to life, in their testing of it by the lessons of history and literature; in short, in their outlook as gentlemen, in the highest, finest sense of that word, upon the passing world.

It is of course no paradox to say that the letters reveal Holmes the American, as, in some respects, more English than Pollock the Englishman, and Pollock the Englishman, as, in some respects, more American than Holmes the American. While Holmes wrote a good deal about his own work as Pollock did about his, Holmes was always writing about England—English women, English scenes, English points of view, while Pollock in turn, was always showing interest in America—American scenes, American points of view.

The letters are of course, recommended reading for laymen as well as lawyers, because of their style, because of the moving picture they present of the great times these two lived through, and because of the many interesting things they thought and said and did and because they show shining through the superficial unlikenesses, the shallow differences, their fundamental likenesses, their deep resemblances, and throw a steady light on the countenances and characters of these two great lawmen, gone but not forgotten. But I think it must be admitted that they will be found especially appealing to lawyers, and particularly to those who knew personally and greatly admired either or both of them. Beginning with a letter from Pollock, written in 1874, when Holmes was 33, Pollock 28, and ending in 1932, when Holmes was 91, Pollock 87, with one from Holmes, there were, before the nineties, only a few of them, and they far between. The real correspondence begins when these men were in or approaching their fifties and continues in full and fuller vigor and interest for nearly 40 years.

To summarize any book, its influence or its content, without over- or under-statement, is always difficult. It is particularly difficult to do it with a book of this kind. But I believe I may say that to a sexagenarian like myself, the outstanding thing about the letters is that they show that while life lasts, the undying, the fundamental thing in human beings, whether great or little by human measure, is their simple humanness. They show that education, knowledge, ambitions, intellectualizations, pride of opinion or of place, are all glosses on the man. They show that the essential quality of a man is that humanness which, completely dominant in childhood, giving place for a time to ambition and striving, takes him in charge again, when age brings wisdom, and so taking him shows the futility of ambition, of learning, even of life itself, except as it is a maker and forger of the ties that bind one life to another. While there are graphic and memorable phrases throughout all the letters, to me the most charming and interesting of them are those written after each was in his late sixties, when, all passion spent, each found in reading, in the conversation of the young men around him, and in writing to choice friends, the real meaning of his life, his real happiness in it.

A thing to note, as the letters reveal it, is that neither changed much in pattern during the sixty years they wrote. The colors softened and became richer, tolerance became understanding, but in outline the pattern of each life was the same. I do not believe that the passing years brought to either any new, or for either seriously changed any old, convictions. But more with Pollock I think than with Holmes, the intensity with which their views and notions were earlier entertained, relaxed, became less uncompromising. Each acquired, I think, a mellowness. With each, his catholicity of view became more spiritual, less a mere matter of thinking and resolve.

I know that if I were asked to choose, from the books that have come to market in these last years, the one or two which mean the most to me, I should without hesitating name this collection of letters. But I should do it with the caution that they are not to be read through like a novel nor to be read individually as though each were complete in itself. They are to be read collectively and individually, or in legal phrase jointly and severally, as the record of the broadening and deepening streams of the lives of two friends, which flowing, each on its own course, yet more and more converged.

I should like to quote from the many quotable passages some of them which have moved me most, but must content myself with referring in a note,[1] if the tyrant Megan will let it through, to the pages I have marked, and bring this to a close. For while the Sultan allowed Scheherazade 1001 nights to kill time with her tall tales or die, Megan has choked me down to 1000 words.

JOSEPH C. HUTCHESON, JR.
United States Court of Appeals
Houston, Texas

1. Vol. 1. Pages 42, 43, 44, 46, 50, 53, 54, 57, 59, 62, 65, 67, 68, 71, 73, 74, 75, 79, 81, 83, 85, 86, 90, 95, 99, 100, 103-4-5-6-7-8-9, 112, 116, 118, 123-4, 127, 130-1, 136, 140, 141, 161, 163, 167, 205, 239.
Vol. 2. Pages 16, 25, 28, 36, 47, 49, 63-4, 71, 72, 73, 76, 78, 79, 84, 89, 90, 92, 96, 104, 106, 108, 114, 115, 124, 125, 131, 132, 133, 136, 161, 181, 191, 192, 197, 215, 218, 235, 243.

Cases and Materials on Domestic Relations. By Joseph Warren Madden and William Randall Compton. 1940. St. Paul: West Publishing Co. Pp. 901.

The Stepfather in the Family. By Adele Stuart Meriam. 1940. University of Chicago Press. Pp. 155.

The present Madden and Compton volume is a thoroughly revised and rather completely rewritten version of the original edition published in 1928. Some of the original materials have been rearranged, and several new topics have been added, primarily a new chapter on Acts of Third Parties Inducing or Preventing Marriage. Because of the importance of marriage evasion and migratory divorce, certain leading decisions on the conflict of laws in these fields have been added and placed in an appendix. Some of the topics carried in the earlier edition receive more complete treatment in this volume, e. g. community property. On the other hand some other topics have been shortened in their treatment, e. g. material on infants. Since this case book is primarily for law teachers, the organization of the materials has been conformed more or less to teaching requirements. Likewise the authors have inserted very valuable introductory statements to certain topics, notably divorce and community property. Otherwise the instructor is presumed to offer such introductory material and the text plunges directly into the cases. One of the obvious evidences that this work has been brought up to date is the constant reference to Professor Vernier's monumental work on American Family Law, particularly so far as concerns current changes in statutes. No doubt a future edition of this work will have to give considerable attention to situations created by the new social security legislation and particularly by the Aid to Dependent Children Act. Probably, in line with changing mores, future editions also will feature somewhat less the term "bastards" which is still conspicuously used in this text.

Miss Meriam's monograph offers a very timely supplement to the case book, in which diligent search fails to discover the slightest reference to stepchildren or step parents. While the purpose of Madden and Compton was to serve law students, the objective of Miss Meriam is to provide facts for social service workers or those in administrative positions called upon to make important decisions for public or private agencies with regard to responsibilities for relief. Her work arranges itself in a progressive sequence from the traditional status of the stepfather at law, the stepfather as stranger, the stepfather *in loco parentis,* the stepfather as guardian, and finally the stepfather under the Social Security Act. The limitations of existing law are obvious. Indeed, as

Miss Meriam shows, there is comparatively little statutory law on this subject, most of the problems having been dealt with through court decision. In this whole matter of the status of the step parent there has been an interesting cycle. Originally it was assumed that the step parent takes on the character of the natural parent. Then, by a series of court decisions, a step parent was relieved of responsibility and was not considered as a real relation. Later cases, however, were more realistic, looked into the facts, and decided the case according to whether the stepfather really acted *in loco parentis*. After about the middle of the nineteenth century the latter doctrine seems to have been pretty generally accepted in the United States, but subject to many questions and limitations, e. g. with regard to inheritance and guardianship. Until the advent of some special provisions of our Federal Social Security law, American legislation was considerably less specific in assessing responsibility to the stepfather than has been characteristic in England since the poor law reform of 1834. In spite of the federal statute concerning aid to dependent children the attitudes of the various states remain strikingly different from the standpoint of administering the law in cases of step parents. In general we may conclude from the present status of American law that where a stepfather has established an *in loco parentis* relationship he is liable for the support of his step children and cannot recover for support he has furnished. Once this relationship has been established the same rights, duties and obligations follow between step parent and stepchild as between natural parent and child. This seems to be the law in all the United States with the exception of New York where his liability is enforcible only by a public officer if it is a question of liability for children who might otherwise become public charges. Not a single American state, however, has yet adopted the policy of the British law which makes the stepchild an integral part of the stepfather's family on his marriage to its mother and places on him automatically the burden of its support. So far as recommendations to overcome the limitations of existing law are concerned Miss Meriam suggests, in cases where the child's natural father is still living, an equitable principle of support of the step children according to the relative means of the father and stepfather and their respective obligations: this decision to be upon a case work basis. For those children who have neither a living father nor any property of their own from which they may obtain support the inadequacy of the present law would seem to need legislation allowing assistance from the state if the stepfather is unable to meet his obligation for support, and that the law should include some provision whereby the stepfather could be made to assume this responsibility where he is able but fails to do so. It is at this point that the aid to mothers provision under the Social Security Act points the way. Miss Meriam's monograph is implemented with a list of judicial decisions together with certain selected judicial decisions more or less *in extenso* to bring out major principles.

Northwestern University ARTHUR J. TODD.

Dicey's Introduction to the Study of the Law of the Constitution. Edited, with Introduction and Appendix, by E. C. S. Wade. Ed. 9. 1939. New York: The Macmillan Company. Pp. clvi, 681. Dicey's *Law of the Constitution* was first issued over fifty years ago and has long since become a classic. It has the virtues and defects of this classification. When it appeared it was an exposition of constitutional law from the point of view of liberty against arbitrary government. It never professed to be either comprehensive or to illustrate social or other forces behind the law. It has been well described as "Whig, colored with the concepts of 1688." Its defects lay in too wide generalizations, too narrow and insular points of view, which, with its classic flavor, have gathered round them a veneration, which itself has broadened them even beyond their original complacency until *Dicey* has become an uncritical source of arguments among both lawyers and laymen against all the necessary and inevitable instrumentalities of the modern service-state. All this has been said many times before, but it is well that it should be said once more in a professional journal.

The ninth edition has fortunately fallen into the hands of a distinguished constitutional lawyer and, as might be expected, he has disclosed the greatest editorial wisdom. He has left the main body of the text as the author left it in 1914 (with a few new footnotes), and he has written a long and well-balanced introduction dealing in modern terms with the legal sovereignty of parliament, the rule of law, and the conventions of the constitution—Dicey's fundamental themes. In addition, the learned editor has added several discussions devoted to English and French administrative law, the legal liabilities of the state and its agencies, the present position of the law of public meetings, and the rules which govern freedom of discussion. No attempt has been made to provide a general treatise on constitutional law.

As the work now stands, the student can appreciate the value as well as the limitations and defects of Dicey's text through the provision of a body of practical, sober, and scholarly criticism passing to modern views of English public law and stated with skill and free from any note of political preferences. Dr. Wade deserves the thanks of all lawyers for the admirable manner in which he has carried out a work of considerable difficulty and no one is likely to dispute his methods. Unless *Dicey* is to be laid on the shelf by the profession or handed over to students of political opinion, we are confident that Dr. Wade has developed a technique of editing which his successors may well follow. The notes and index are excellent and the edition is worthy of the highest traditions of legal scholarship.

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(Continued on page 583)

AMERICAN BAR ASSOCIATION
JOVRNAL

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This Bill Should Pass

The Committee on the Judiciary of the House of Representatives has reported favorably the bill prepared by Chairman Hatton W. Sumners (H. R. 146), which before its introduction was unanimously approved by both the Assembly and the House of Delegates of the American Bar Association, under circumstances which made such action one of the inspiriting events of the Philadelphia meeting last September (AMERICAN BAR ASSOCIATION JOURNAL, October, 1940; pages 760-763, 781; 65 A. B. A. Rep. 78-80, 140). The bill thus sponsored by the Association provides for the judicial trial and determination, subject to review by the Supreme Court, of issues as to the "good behavior" of judges of certain Federal Courts.

The report by the majority of the Committee makes a persuasive plea for the early enactment of the bill. It cites as authoritative recommendations in its support the unopposed action of the Assembly and the House of Delegates and the opinion of Acting Attorney General Biddle, and quotes in full the editorial which appeared in the JOURNAL for March of 1941. It quotes also, from the report of the Judicial Conference at its October Session in 1940 (page 23), the following resolution adopted by the Conference upon the report of a special committee made up of Circuit Judges John Biggs, Jr., Orie L. Phillips, and Learned Hand, "with respect to an alternative for impeachment proceedings in the case of Circuit and District Judges charged with derelictions":

> "Assuming its constitutionality, as to which we express no opinion, we are in accord with the general purpose and approve in principle the provisions embodied in H. R. 9160, Seventy-sixth Congress, third session."

It is a basic American concept that the members of the Supreme Court and the inferior Courts of the United States shall hold their offices "so long as they shall behave themselves well." This is the objective of the constitutional provision that "the Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior" (Constitution, Article III, Section 1). Removal by impeachment is expressly provided for, as to "all civil officers of the United States" (Constitution, Article II, Section 4). As to a President, Vice-President, or Justices of the Supreme Court, removal other than by the laborious processes of impeachment before the Senate would hardly be considered. On the other hand, resort to the cumbersome machinery of impeachment, taking up the time of supposedly the whole Senate for days without limit, does not conduce to the prompt and dignified disposition, on the merits, of charges of misbehavior by Circuit and District Judges. The grounds of impeachment are limited to conviction for "treason, bribery or other high crimes and misdemeanors." On impeachment trials, the Senate does not derive power or authority at all from the "good behavior" clause, which the Sumners bill proposes to implement as to the termination of the tenure of accused judges of certain legislative Courts. None of the historic safeguards of judicial independence in tenure would be waived or withdrawn; in fact they would be fortified and enhanced.

Upon a resolution adopted by the House of Representatives finding that reasonable grounds exist therefor, on the recommendation of its Committee on the Judiciary after investigation, addressed to the Chief Justice of the United States, the latter would convene a special Circuit Court of Appeals, for the Circuit in which the accused Judge resides, for the trial of the issue of his good behavior and his right to remain in office. Under appropriate safeguards for impartial trial, three Circuit Judges would constitute the tribunal. The Attorney General, with the aid of Managers appointed by the House of Representatives, would institute and conduct the proceeding for removal. If the findings and judgment of this special Court sustain the charges of misbehavior and provide for removal, the accused has the full protection of deliberative review by the Supreme Court.

Removal through impeachment and conviction of "high crimes and misdemeanors" remains available, if the prominence of the accused Judge or the nature of the charges are deemed by the House of Representatives to make such a course preferable. On the other hand, an orderly and efficacious procedure is provided by the bill, to be available in the alternative, for the impartial and nonpolitical determination of issues of judicial "behavior" other than "good" in the constitutional sense. It would indubitably be used under circumstances where, in justice to the consideration and dispatch of vital business of legislation, the time and thought of the whole Senate could not and would not be given adequately to the hearing and weighing of impeachment testimony. It seems of the essence of good sense and adequate safeguards for the integrity and independence of our Federal Judges, to enact this bill.

Unfortunately, the bill comes to the House with a minority report from the Committee on the Judiciary.

Still more regrettably, the dissentient report is signed only by members of the minority political party in the Congress. The minority report does not argue against the merits and desirability of the Sumners bill; it challenges its constitutionality. Without disparaging the usefulness of a "party of opposition" in preserving the vitality of legislative processes in days when they are sorely tested, we are confident that the capable lawyers who sign the minority report would not hesitate to agree that partisanship should not enter into issues affecting the integrity and tenure of Judges of the Courts of the United States. They should be the last to do what they would be the first to condemn, if done by others. The merits of the argument as to constitutionality need not be repeated here. Distinguished lawyers in the Congress, as well as in the American Bar Association, have expressed themselves as confident of the validity of this highly desirable measure. The majority report makes an impressive showing in favor of its constitutionality as well as its worth.

With full appreciation of the prerogative and duty of members of the legislative branch to be governed by the Constitution as they read and interpret it, we recognize that the minority members of the Committee have performed a public duty in placing the constitutional issue competently before the Congress. That having been done, lawyers interested in improving the administration of justice in the Courts of the United States will hope most earnestly that no partisan lines will survive the processes of discussion and that the bill so cordially sponsored by the American Bar Association will speedily become law.

Price Control and the Defense Program

Price control, as a part of the defense program, seems to be inevitable. Legislation on that question is imminent and it will have broad effect on the business world. It will be one of the matters concerning which clients will soon be consulting their legal advisers. The law of price control should be of interest to every lawyer because of its effect upon the interests of those whom the lawyer must advise.

The JOURNAL therefore invited Mr. Leon Henderson, Chairman of the Office of Price Administration and Civilian Supply, chief proponent of price regulation, to write an article on the legal aspects of price control in the defense program. Since the request of the JOURNAL emphasized the discussion of legal questions, Mr. Ginsburg, General Counsel for OPACS, was requested by Mr. Henderson to furnish the article.

The JOURNAL also invited United States Senator Taft for an expression of his views on the legal questions involved. Notwithstanding his many commitments, Senator Taft accepted the invitation.

Proposed Code of Evidence

This is an age of the simplification of our law. The Federal Rules of Civil Procedure, the growing movement for assimilation of state procedure to the federal model, the extension of the Rule-making Committee and the coming rules of procedure in criminal prosecutions are all manifestation of that tendency.

It seems likely that another of these great projects may be the development of modern and simplified rules of evidence.

The movement for a new Code of Evidence which shall replace complexity by simplicity, has been taken up by the American Law Institute and such progress has been made that the JOURNAL has arranged for the publication of a series of articles written by Edmund M. Morgan of Harvard, American Law Institute Reporter on Evidence. No up-to-date lawyer can afford to neglect this series. The introductory article appears in this number and four, perhaps five, monthly installments will follow.

Chief Justice Hughes and Legal Aid

Former Chief Justice Charles Evans Hughes has always been one of the greatest champions of legal aid work. He is Honorary President of the National Association of Legal Aid Organizations, succeeding Chief Justice Taft in that position. From 1916 to 1921 he was president of the New York Legal Aid Society and is today one of its Honorary Vice-Presidents.

He addressed the annual convention of the American Bar Association in 1920 at St. Louis on "Legal Aid Societies; Their Function and Necessity" and was the first chairman of its newly created Committee on Legal Aid Work. He resigned when he became Secretary of State under President Harding, but in that post he gave aid and encouragement to the international meeting in behalf of Legal Aid held at Geneva in 1924. In his own words:—

> "The legal aid society is an agency of justice—doing what it is not practicable for lawyers to do individually on any large scale. The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. The legal profession owes it to itself to assure the maintenance of an institution which intelligently, and without waste or friction, meets this need and accomplishes through competent organization what lawyers would be glad to accomplish, if it were feasible, through their individual efforts. Does the lawyer ask, who is my neighbor? I answer —The poor man deprived of his just dues."

To all the staff attorneys in legal aid offices and to their hundreds of thousands of clients it has been a constant source of inspiration and assurance that the highest judicial officer in the nation was concerned that legal aid should be supported and improved to the end that no man, woman, or child, however humble or poor, should be denied the equal protection of our laws.

CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS

Professor of Law, University of Chicago

Military Law

The Army Court Martial System, by Archibald King, in 1941 Wisconsin L. Rev. 311. (May, 1941.)

Colonel King has examined the rights of a soldier accused of the commission of a crime or military offense and he explains the procedure that has been developed for his protection. The Articles of War enacted in 1920 by Congress constitute our military code. Article 95 provides that an officer or cadet shall be dismissed from the service if "convicted of conduct unbecoming an officer and a gentleman." Article 96 confers jurisdiction upon courts-martial to punish for "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital." These provisions are vague and may seem to be an open door to oppression. But custom of long standing has "pretty well settled" the offenses covered by these two articles and oppression does not occur. The 38th Article provides that the President may prescribe court-martial procedure and this has been done. The result is a Manual for Courts-Martial. A supposititious person is taken through a summary, special, and a general court-martial and the procedure that gives him a fair trial is detailed. Before conviction, the accused has information of the charges, open trial, right to procure evidence, and also counsel, except for petty offenses tried by a summary court-martial. The procedure is much like that in an orthodox court except that there is no jury and a finding may be returned by two-thirds of the members of the court-martial, except on the charge of spying requiring the death penalty. "After conviction, there is an elaborate system of approvals and examinations of the record equivalent to two successive automatic appeals with every plausible exception considered saved, whereby greater protection is afforded to an accused against an illegal or unjust conviction or a sentence than he has elsewhere. Finally, when the accused has become a prisoner, he is protected against harsh treatment, has a chance by good conduct to earn an abatement of his sentence and a parole, and, if his offense does not show moral turpitude, to be restored to an honorable status as a soldier."

Labor Relations

Treatment of Violence in Labor Disputes by The National Labor Relations Board, by Walter Daykin, in 26 Iowa L. Rev. 772. (May, 1941.)

The key to this interesting article on a highly controversial subject seems to be this: the decisions of the Board have the author's approval but the decisions of the courts which have checked the Board merely obtain his acceptance as the law for the time and the place. An innovation by the Board has been that it refuses to condemn a worker merely because he has indulged in violence. Rather the Board seeks to discover who really caused the violence. As a result, workers frequently have been excused for their violence and the employer has been held responsible because he provoked the violence. Furthermore, the Board apparently accepts "the prevalent philosophy that in America some violence may be expected in labor troubles," and does not refuse an employee reinstatement unless his behavior is in excess of that of a reasonable person under the circumstances. Despite the Fansteel decision, "the Board has not arbitrarily allowed the sit-down strike to bar the reinstatement of employees involved." In short, the Board in deciding upon reinstatement uses two measuring rods, to-wit: "(1) whether the violence committed would render the guilty worker unfit for further employment, and (2) whether reinstatement would encourage violence in future labor disputes and thereby fail to effectuate the policies of the Act." The author draws two final conclusions: (1) "even though the Board may have erred occasionally in its decisions and sometimes used language that was nonjudicial and that may have been unnecessarily caustic, it has facilitated the trend toward industrial democracy"; and (2) all rulings of the Board are subject to review by specified courts. He omitted to state that the court review on questions of fact is a very limited one.

Judicial Selection

Supreme Court Justice Appointments: II, by John P. Frank, in 1941 Wisconsin L. Rev. 343. (May, 1941.)

The tremendous industrial and economic changes in the latter part of the Nineteenth Century had their effect upon the selection of justices of U.S. Supreme Court. Before 1877 the chief objections were levelled at political sins and personal characteristics. Thereafter, "in greater degree than ever before, politicians and the public examined a prospective justice's economic as well as his political views." The nomination of Stanley Matthews received a spattering of applause and a volume of denunciation, because he was a "railroad lawyer." Confirmation was finally secured by a vote of 24 to 23. Information is lacking concerning the Arthur appointments of Gray and Blatchford. L. Q. C. Lamar, nominated by President Cleveland, was opposed because of his age and an insinuation of immorality, but primarily because he had been a Confederate officer. The Senate consisted of 38 Republicans, 37 Democrats, and one Independent. The Independent and two Republicans voted for him and thus his nomination was confirmed.

The nomination of Melville W. Fuller as chief justice was long contested but the main reason for this was the disappointment of Senator Edmunds that Edward J. Phelps of his home state had not been nominated. Charges of professional misconduct came to nothing and Edmunds attacked Fuller for his Southern sympathies during the Civil War. Senator Cullom of Illinois replied that Phelps had been a violent Lincoln hater. Democratic Senators "sat back and chuckled" and Fuller was confirmed 41 to 20. For the first two vacancies during his term, President Harrison selected two judges with long experience. Practically no contest was made and Brewer and Brown were readily confirmed. Likewise his two later nominations of Shiras and Jackson were confirmed quickly and without appreciable opposition. Not much information is available concerning the appointments during the terms of Cleveland, McKinley, and Theodore Roosevelt. "The papers bearing on appointments between 1894 and 1909 are apparently completely lost." Of chief interest are the rejections of Hornblower and W. H. Peckham because of senatorial courtesy invoked by Senator David B. Hill for a bad reason. As a consequence Senator Edward D. White was appointed. President Cleveland's next appointment was Rufus W. Peckham, to whom Senator Hill had consented in advance. President McKinley selected Joseph McKenna and Roosevelt selected Holmes, Day, and Moody. President Taft's mission was "to save the Constitution from progressives by appointing conservatives" and he "knew how to pick conservatives," viz., Lurton, age 66, appointed over the protests of some organized labor groups, Hughes, White from justice to chief justice, Van Devanter, Lamar, and Pitney.

Academic Freedom

Trial By Ordeal, New Style, by Walton H. Hamilton, in 50 Yale L. Jour. 778. (March, 1941). *The Bertrand Russell Case Again:* (1) *Portrait of a Realist, New Style*, by Walter B. Kennedy; (2) *Professor Hamilton's Law*, by William R. White, Jr., in 10 Fordham L. Rev. 196. (May, 1941).

Here is an opportunity to see how professors can take down their hair and sling mud. It would be funny if it were not for a fear that the Russell decision and the comments are exhibitions of highly emotional religious differences which may indicate that this country is due to have much trouble of this sort in the future. In the court's opinion and in these articles, tolerance and self restraint seem to be noticeable by their absence. Bertrand Russell, an "international famous mathematician and philosopher," was appointed to the faculty of the College of the City of New York. Justice McGeehan revoked the appointment. Professor Hamilton's criticism is merciless. Observe: "In an opinion of some five thousand words—half of which represent a labor of supererogation—the judge rises to every error which opportunity presents. . . . The urge against free thought left no time for the etiquette of stately adjudication. . . . Justice McGeehan, in usurping an office which does not belong to his court, puts the pursuit of knowledge, upon which all human progress depends, in mortal jeopardy." Professor Kennedy, by way of incidental defense of Justice McGeehan, sarcastically criticizes Hamilton and the "realist reformers," mentioning Jerome Frank, Thurman Arnold, Fred Rodell, and Myres McDougal. "Professor Hamilton's paper discloses neither legal research nor adequate factual material." Aside from attacks on Hamilton's scholarship in the introduction and conclusion, Lecturer White has the most satisfactory discussion of the law in the case. Some of it *seems* convincing; some of it does not, viz., that Bertrand Russell, because of utterances concerning communism, atheism, and the Constitution, could not be admitted to citizenship, and that, "A generation of students beclouded by the obscurantisms of a Russellian moral code will be unlikely to lead upright lives."

Legal Biography

St. Thomas More as Judge and Lawyer, by Garrard Glenn, in 10 Fordham L. Rev. 187. (May, 1941.)

Professor Glenn made a short but interesting address at a luncheon meeting of the Saint Thomas More Society of America. St. Thomas is remembered particularly for three legal accomplishments: "First, he reformed the practice in Chancery. Second, he created the idea that equity would relieve against forfeitures, thereby transforming the ancient bond into a modern obligation, and also laying the groundwork for the present day mortgage, with its equity of redemption. And third, he proposed, far in advance of his time, that fusion of law and equity, in remedial practice, which his native country enjoys today under the Judicature Act of 1873, but actually came into being with the New York Code of Procedure of 1848, and lately has been exemplified in the Federal Rules."

Administrative Law

The Acheson Report: A Critique, by James Hart, in 26 Iowa L. Rev. 801. (May, 1941.)

Another review of the Final Report of the Attorney General's Committee on Administrative Procedure agrees with the majority of the committee and disagrees with the minority of four. He commends the four, however, for "realizing that even from their own point of view enactment of the majority Bill is better than nothing. . . . The net effect is thus to make them not dissenters but go-furtherers." After a relatively brief and clearly stated summary and criticism of the Report, Professor Hart concludes that the majority Bill should be enacted. As for the minority Code, it should not be enacted or regarded by administrators as a strict guide. Rather, it should be considered as a "statement of a standard by three eminent members of the school of thought that still distrusts the administrative tribunal as an institution." With commendable frankness the author admits that he belongs to the school of thought of the majority of the Acheson Committee.

Constitutional Law

Judicial Review as a Safeguard to Democracy, by C. Perry Patterson, in 29 The Georgetown Law Jour. 829. (April, 1941.)

This paean of praise for judicial review should be pleasurable reading for most lawyers. In the main it is threshing old straw but new ideas are few and they are not the only ones worth considering. Mankind has long searched for effective devices which will protect against governmental despotism. What has been the result? Since the English government could change the constitution into a totalitarian state and perpetuate itself in power, the conclusion is forced "that Great Britain as yet has evolved no effective constitutional guaranty or safeguard for her democracy." In the France that was, the political executive could not dissolve the legislative body and therefore representative government had a stronger position than any other nation in the world. Still the French system was not well balanced. The executive was too weak and personal rights were dependent upon political power. In Germany the mistake was made of limiting the principle of judicial review to the action of state legislatures, but legislative supremacy was granted to the national legislature. "The result was the abolition of the states by the Reich and the establishment of totalitarianism." In the United States, "if judicial review can maintain the Bill of Rights against executive and legislative assaults it will preserve our democracy." But here is our weakness. Congress has the power to prescribe the appellate jurisdiction of the national Supreme Court and thus limit the cases in which that court may exercise judicial review. Thus the existence of our democracy in the long view would seem to depend upon the respect that the voters have for the opinions of the Supreme Court of the United States.

Taxation

Federal Tax Litigation and the Tax Division of the Department of Justice, by Lucius A. Buck, in 27 Virginia L. Rev. 873. (May, 1941.)

Alexander Hamilton was a believer in internal taxes and the national government imposed such taxes until Jefferson secured their repeal. The War of 1812 caused their revival until 1817. From then until the Civil War internal taxes remained verboten. Since 1861 the national government has always had internal taxes, but our present complex system began with the revenue acts of the first World War. Efforts to supervise internal revenue disputes started in 1797 and became more complicated and confused until "it required one versed in the intricacy of departmental corridors simply to find the office in charge of his case." President Roosevelt acting under the Economy Act of 1932, issued an Executive Order in 1933 transferring to the Department of Justice control over the court activity of claims by and against the national government. To handle the tax litigation became the task of the Tax Division. Litigation involving taxes on beverages and customs matters was not included in the task. Aside from an administrative section, the Tax Division is divided into four sections: (1) Supreme Court and Circuit Court of Appeals; (2) District Court; (3) Court of Claims; and (4) Criminal and Compromise. The reorganization has accomplished a needed reform of the chaotic condition which existed prior to 1934 and has taken the management of tax litigation entirely out of the hands of the tax assessing and collecting agency. Some suggestions for improvement are made but the general conclusion is that the Tax Division is a justified reform and that it has performed its functions with ability and fairness.

A Blood-Feud Trial in Homeric Times

[*From "A Kaleidoscope of Justice" by John H. Wigmore, published by Washington Law Book Company, 1941. Ed.*]

"No one now can say whether a real person, Homer, existed; nor can even the date of the composition of the earlier texts of the epic poems, the Iliad and the Odyssey, be positively determined. The range of dates attributed has been between B.C. 800 and B.C. 1200.

"At one stage in the plot of the Iliad, Achilles is burning with the desire to avenge his companion Patrocles, slain by Hector. The goddess-mother of Achilles, Thetis, keen to help him, seeks the aid of Hephaestus, the fire-god, master of all metal-work, whose forge is in heavenly Olympus. Hephaestus makes a splendid shield for Achilles. The shield has twelve compartments of decorative design, each representing a scene from Greek life.

"One of these scenes represents a trial in the market-place. This is the earliest specific mention of democratic justice in literature. In the main features it corresponds to the Germanic trial as described in the Nordic sagas of two thousand years later."

. . . In the market-place
The people were assembled for a lawsuit.
The parties were disputing o'er a sum
Offered to buy off guilt for taking life.
The killer vouches that the sum is fair,
And to the people pleads he should be quit.
The dead man's kinsman says, 'Tis not enough.
Both asked for judgment to decide the case.
Anon loud clamor favored each in turn,
For each had eager friends among the crowd,
And heralds held in check the noisy throng.
The elders of the tribe, on polished stones
Ranged round the center, sat and gravely heard.
Then, with a herald's scepter in his hand,
Each elder rose, and in his turn proposed
The judgment he advised. And in the midst
Two golden talents lay, to be the fee
Of that wise elder who should speak
The fairest judgment on the pending case.

FRUSTRATION OF CONTRACT AND THE BURDEN OF PROOF

TWO notes in the current (July, 1941) number of the *Wisconsin Law Review* will remind the bar that the problem of the "burden of proof" comes up in very various forms. The second note discusses the Wisconsin treatment of the presumption (a "first cousin" of the burden of proof, as Dean Charles T. McCormick puts it) that the driver of an automobile is the owner's agent and is acting within the scope of his agency. The other note treats of the burden of proof in declaratory judgment actions, where the normal position of the parties is reversed. This latter situation seems to be illustrated also in another field of the law—frustration of contract. An important decision in this field has been announced recently in England. A, the owner of a ship, chartered it to B. On its way to the port of loading, and before delivery to B, the ship was destroyed by a mysterious explosion. B sued A for damages occasioned by the failure of A to deliver the ship to B for loading. It was agreed by both parties, and by all the judges in all the courts which had to consider the case, that the contract was frustrated and void [or "avoided"], and no liability attached to the owner A, *if* the loss of the ship was without his fault. But who had the burden of proof on this? The experienced judge of first instance replied, The charterer. The Court of Appeal unanimously said the contrary, and was so sure of it that leave to appeal to the House of Lords was refused. The House, however, was of a different mind; it granted leave to appeal, and unanimously reversed the Court of Appeal and restored the original judgment. Upon destruction of the ship being shown, the owner is free of liability unless the charterer can prove that the owner was at fault. The case is *Joseph Constantine Steamship Line v. Imperial Smelting Corp.*, (1941) 2 All Eng. Reps. 165, decided on May 9, 1941.

Wigmore (*Evidence*, 3rd ed., 1940, vol. 9, pages 274-5) discusses some considerations which have been advanced in an effort to determine which party has the burden of proof in a particular case, and the objections thereto: he says, e.g., that "the burden is often on one who has a negative assertion to prove," and that the burden is not always on "the party who presumably has peculiar means of knowledge." Wigmore concludes: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations."

Erie Railroad Co. v. Tompkins will occur to everybody at this point. Is the burden of proof a matter of substance (and hence governed by State law) or of procedure? This point has been glanced at in one or two law journal articles since the *Erie Railroad* case: see, e.g., an article in 33 Ill. Law Rev. (1938), page 142, col. 2, middle, note 76, in which note a reference is made to *Central Vermont Railway Co. v. White*, 238 U. S. 507 (1915), 59 L. ed. 1433. (The latter case was tried in the State courts, and the Conformity Act had no application). Mr. Justice Joseph R. Lamar, in giving the judgment of the court in the *White* case, said:

> "The defendant, however, insisted that White knew his train was behind time and running at a low rate of speed. The company contended that, in view of these circumstances, it was his duty, under the rules, to put out lighted fuses and torpedoes in order to give warning of the presence of train No. 401 on the track. On that theory the company asked the court to charge that the burden was on the administratrix to show that White was not guilty of contributory negligence. In considering that exception the supreme court of Vermont held that the defendant's contention was based on a correct statement of the state rule, but said: 'This case, however, is brought upon an act of Congress . . . (which) supersedes the laws of the state in so far as the latter cover the same field . . . Consequently the question of the burden of proof respecting contributory negligence on the part of the injured employee is to be determined according to the provisions of that act' . . .
>
> "In this court the argument was devoted principally to a discussion of this ruling—counsel for the railroad company earnestly insisting that 'the *lex fori* must determine all questions of evidence, including that of the burden of proof . . .'
>
> "There can, of course, be no doubt of the general principle that matters respecting the remedy . . . depend upon the law of the place where the suit is brought . . . But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability . . . In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.
>
> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. . . . But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff . . . Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Seaboard Air Line R. Co. v. Moore* . . . There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

This last paragraph can scarcely stand with the *Erie Railroad* case.

Everything considered, the *Constantine Steamship* case will be worth keeping in mind, particularly in war-time, with its extensive destruction of instrumentalities of commerce.

C. P. M.

MARYLAND'S MOVEMENT TOWARD IMPROVED PROCEDURE*

By W. CALVIN CHESNUT
United States District Judge for Maryland

THE program of the American Bar Association for improvement of judicial procedure has induced substantial progress in Maryland. By Chap. 719 of the Acts of Assembly of 1939 the full rule-making power was given to the Court of Appeals "in all civil actions both at law and in equity in all Courts of Record throughout the state." The act in substance follows the pattern of the federal act of June 19, 1934, c. 651, 28 USCA, ss. 723b, 723c. The power given by the Maryland Act includes the regulation of appeals in civil actions, and "the form and method of taking and the admissibility of evidence in all civil actions."

The Maryland Court of Appeals did not immediately act on the authority so given, but waited until the sentiment of the Bench and Bar with respect to the constitutionality and expediency of the act had substantially crystallized. This was expressed after very full consideration of the subject by a largely attended meeting of the Maryland State Bar Association in January, 1940, at which time after full discussion the Association indorsed the legislation by a large majority. Promptly thereafter the court appointed a representative Advisory Committee selected from judges and lawyers in Baltimore City and the 23 counties of the state, of which Hon. Samuel K. Dennis, Chief Judge of the Supreme Bench of Baltimore City was the chairman. By the enabling act the Court was authorized to employ necessary assistants and fix their compensation, but the Committee members served without remuneration except for their expenses. The Committee promptly organized and was very fortunate in securing the services of Robert R. Bowie of Baltimore, as its Reporter. After several months of intensive work the Committee submitted its report, with specific recommendations as to changes in practice and procedure, to the Court of Appeals, which, after consideration, adopted the proposed new rules and submitted them, in accordance with the requirements of the act, to the General Assembly on January 30, 1941. Though there was some opposition in the Legislature, no changes were made. These new rules will, therefore, as provided in the act, become effective throughout the state on September 1, 1941. A general symposium for discussion of the new rules was held at the last June meeting of the Maryland State Bar Association. The Legislature, the Bench and the Bar of Maryland are to be greatly congratulated on this effective step in the improvement of judicial procedure.

The new rules fully modernize legal procedure with respect to the taking of depositions and discovery before trial. In this respect they follow largely the pattern of the federal rules upon that subject. In the field of pleading the troublesome technical question as to whether a plea amounts to a general issue plea has been put at rest by the provision that there shall be no objection to any special plea on the ground that it amounts to the general issue. And there is a very well formulated special rule with regard to the procedure in obtaining judgments by confession. It is, however, in the matter of trial practice that the greatest innovations are made as compared with prior legal procedure. Voluntary dismissal by the plaintiff taking a non-suit, which has so often resulted in unnecessary duplication of trials, is strictly limited; consolidations of two or more actions involving a common question of law or fact or a common subject-matter are authorized in the discretion of the court; as are also special verdicts by jury answers to specific interrogatories in lieu of a general verdict. The federal rules as to directed verdicts and judgments *non obstante veredicto* are also adopted, and authority is given for the grant of partial instead of complete new trials.

But probably the most important change in Maryland trial practice consists in the new rule with respect to "instructions to the jury," in which it is now expressly provided that the judge may instruct the jury either *orally* or in writing or both in his discretion. The new rule upon this subject approximates the common law and the federal practice in jury trials. It is a very great improvement over the previous practice which has existed in Maryland for the past hundred years, by which oral instructions by the court to the jury were practically unknown and only written prayers, generally in abstract rather than concrete form, were formulated by the lawyers and granted or refused or modified in writing by the judge. This former practice did not result from any constitutional or statutory mandate, but apparently originated, by departure from common law practice, during the first quarter of the nineteenth century. It is anticipated that the return to the practice at common law will greatly enhance the dignity and efficiency of jury trials by giving the jury a much better understanding of the legal principles applicable to the case, and will also tend to make the work of the judge more interesting and, apparently as well as actually, more authoritative.

*This article is the tenth published in consecutive issues of the JOURNAL in advocacy of the program of the Special Committee on Improving the Administration of Justice.

The enabling act also authorized the Court of Appeals, if deemed advisable, to "unite the practice and procedure in actions at law and suits in equity so as to secure one form of civil action and procedure for both." So far the Committee has not recommended this change, and the court has taken no action on the subject.

Maryland is still one of the few remaining common-law states, and its Bench and Bar have never favorably regarded the meticulous particularity of the so-called code practice adopted by the majority of the states of the Union following the lead of New York under the Field Code of 1848, a conspicuous feature of which has been the union of law and equity procedure. For many years after the adoption of the first Constitution of the State in 1776 there was a separate court of chancery in Maryland, and still today in Baltimore City there are equity courts separate and apart from the law courts, while in the counties the courts of record have separate law and equity jurisdictions and there are separate dockets for law and equity cases. It is only natural that the proposed fusion of the two seems a very revolutionary change. And it must be remembered that the state court separation of law and equity also obtained in federal court practice in Maryland, under the Constitution and the Conformity Act, up to about three years ago when the new F.R.C.P. became effective. While the lawyers who are accustomed to federal practice are now very generally enthusiastic in their approval of the new federal procedure, there are still many lawyers in the state who have not had or taken occasion to familiarize themselves with the new rules. It is not surprising therefore that up to the present time they have not fully realized the advantages which flow from unifying procedure at law and equity. But it is thought that when the advantages of the new practice established in the federal courts become better known, there will be a much more favorable sentiment among the Bench and Bar of the state to its adoption for the state as well as federal practice. What still needs to be more fully appreciated is that the new federal rules have all the great advantages of flexibility, but not the disadvantages of the rigidity and particularity of code practice in some other states. When it is realized that the origin of equity jurisprudence, separate and apart from the common law of England, was an historical development occasioned largely by the lack of vision on the part of common law judges, the necessity for a continuation of that system will seem much less important, and the successful fusion of the two, exemplified by three years' experience in the federal courts, will clearly demonstrate the advisability of the change. To the layman today the continuation of the present system seems mysterious rather than either logical or desirable. It is hard for a lawyer to explain to a client, with a really meritorious case, that, after months or years of litigation in equity, his suit must be dismissed because the lawyer has elected to enter the court by the wrong door. The continuation of a system which makes possible such a result is clearly not consistent with modern demands for efficient legal procedure. In lawyers' own interests, as well as that of the greater public interest, it is imperative that there must be, sooner or later, one unified legal procedure, but always respecting the constitutional right of jury trial where applicable.

The Advisory Committee appointed by the Maryland Court of Appeals has not been discharged but is still functioning, and will doubtless give further consideration to this particular problem, as well as to other desirable changes in legal procedure in the state, including the much needed liberalization of the rules of evidence, the appointment of auditors for complicated accounts in actions at law, motions for summary judgment, third party practice, and the highly important revision of appellate procedure to avoid the often excessive costs of really unnecessary printing of the whole record when only a portion thereof affects the questions on appeal.

PRACTICAL CO-OPERATION

The following letter was recently received at the headquarters office of the Association:

"I am enclosing my check for $16.00 to pay my own dues of $8.00 and to pay dues for a young lawyer friend here who, I believe, will become a regular member and who, I am sure, will uphold the standards of the bar.

"I have suggested to a few of my friends who are members that we pursue this course, which will have a tendency to get a high class of young lawyers familiar with and interested in the work of the Association. While we cannot expect all of them to remain members, if we pick the right sort, many of them will continue and in this way support the organization and help make up the losses we are sustaining by reason of the army service."

An application form is printed elsewhere in the JOURNAL for the use of members who wish to follow this suggestion.

WASHINGTON LETTER

No Quorum, No Decision

A SITUATION without precedent seems to be developing in respect to the Bethlehem Steel Corporation case pending in the Supreme Court. It is understood that, up to the present, three of the Justices have disqualified themselves from sitting on the case and it is anticipated another member of the Court will take a like step. That would leave only five Justices eligible to hear this case, whereas the statute, after providing for the Court consisting of nine Justices, continues: "any six of whom shall constitute a quorum." T. 28 U. S. C. A. Sec. 321, being R. S. Sec. 673, or Judicial Code Sec. 215.

This case has been pending in the courts altogether about sixteen years. Certiorari was granted by the Supreme Court early in last term and it was scheduled for hearing but was necessarily postponed following the disqualification of themselves by the three Justices and the retirement of Justice McReynolds in February of 1941. The particular reasons for the action taken by each of the three Justices have not been made public. Among the reasons sometimes causing judges to disqualify themselves, of course, are having relatives definitely affected by the outcome, former connection with the case, or previous employment as counsel for the litigants.

The members of the Court who ruled themselves out in this case are Chief Justice Stone and Associate Justices Roberts and Murphy. It has been assumed that Associate Justice Murphy disqualified himself because of his having been Attorney General while the litigation was pending; and it has been suggested that Associate Justice Jackson might decline to sit in the case for a similar reason, he having been Attorney General when the Government's request for certiorari was made of the Supreme Court.

The Bethlehem Steel case had its origin in the construction by that company for the Government of eighty-three cargo vessels at the time of the last war. The Government's suit was for an accounting and for recovery of "excessive" profits, alleging that the company took advantage of the war emergency to force acceptance of extortionate terms. The Bethlehem Company countered with a suit for an unpaid balance of approximately $7,700,000. The special master's finding was that they were entitled to $5,270,000, which was approved by the United States District Court for the Eastern District of Pennsylvania, and was sustained by the Circuit Court of Appeals for the Third Circuit. Although holding the contract enforceable, the lower courts severely condemned some of its harsh terms.

Solicitor General Biddle, now Acting Attorney General, has said, in view of the present armament program, that it is "of immediate national concern that there should be an authoritative determination of the extent to which the country's need should place it at the mercy of its contractors." Whether one or more of the retired Justices might be called back to active service for the hearing of this case is not known. Presumably there might be eligible for this duty former Chief Justice Hughes and Justices McReynolds, Brandeis, and Sutherland.

Treasury Law Enforcement Agencies

The several jobs of the different enforcement agencies of the Treasury Department are so varied that, lacking a single climactic appeal, they have not received the public appreciation to which their diligent and effective work entitles them. Even the names of some of these agencies are little known. They are: the United States Coast Guard, the Customs Agency Service, the Intelligence Unit of the Bureau of Internal Revenue, the Enforcement Division of the Alcohol Tax Unit, and the Secret Service. The Chief Coordinator of these agencies is Elmer L. Irey, who has become known chiefly as a revealer of income tax frauds.

The functions of these services often overlap so that many of the outstanding achievements should be credited to several of them. But, since they themselves are not primarily interested in the credit, we who report should be willing to give chief attention to the results accomplished. A few of the important achievements during the fiscal year recently closed will be noted.

A bad situation was cleaned up involving Japanese fishing boats operating in Hawaiian waters. The charge was conspiracy to violate the navigation laws of the United States, especially the requirement that all vessels of American registry must be American owned. Nineteen Japanese fishing boats were seized and six later were forfeited to the United States. False bills of sale and false oaths were resorted to. Many of the Japanese involved in this conspiracy had American-born Japanese wives and American-born Japanese children and other relatives. By placing the registry of their boats under the names of such relatives, they sought to evade the United States navigation laws. In some instances these people lived in Japan; in others they made regular trips to Japan, ostensibly to get medical treatment or to take the baths.

Seizures of narcotics by the Bureau of Customs aggregated eight hundred during the fiscal year, an increase of one-third over those of the previous year. Smuggled liquors showed a decrease, owing partly to the difficulties encountered by the European sources of the supply. A conspiracy of Japanese seamen to smuggle narcotics was broken up with the arrest at San Francisco of a crew member of the Nitta Maru who was attempting to bring in a supply of smoking opium. A customs officer, posing as a longshoreman, went aboard the vessel and took delivery. Another instance was the arrest, conviction, and imprisonment of a Filipino steward on an American vessel who was attempting to bring in a large supply of opium through Baltimore.

One of the more or less routine tasks of the Coast Guard was the

sealing of 9,098 radio apparatus on merchant ships of belligerent countries to prevent unauthorized radio transmissions while in United States waters. The Guard took into protective custody two German, twenty-seven Italian and thirty-five Danish merchant vessels immobilized in ports of the United States. Throughout the year, 34,948 vessels were boarded, of which 708 were reported for violations.

Although narcotics violations are on the decrease because of rigid enforcement, a number of dangerous and notorious criminals were rounded up in that process. Several gangs were broken up and severe sentences received after the conviction of their leading members. With the assistance of state and local authorities an estimated 33,235 acres of growing marihuana were destroyed, which was a 300 per cent increase from the previous year.

The arrest and conviction of several evaders of large income taxes already has been thoroughly heralded in the press; but it might be of interest to know that during the past fiscal year there were indicted from all walks of life 172 persons for evasion of income and other taxes. During that period 192 individuals were tried for such offenses and 156 were convicted.

In protecting the revenue on alcoholic beverages, the Enforcement Division of the Alcohol Tax Unit seized 11,824 illicit stills and arrested 26,010 persons. By persistent sleuthing, and with the cooperation of the Customs Service and the Royal Canadian Mounted Police, the Alcohol Tax Unit uncovered and eliminated one of the largest illicit liquor conspiracies ever organized in this country. This gang had defrauded the Government out of $2,500,000 in excise taxes and the Dominion of Canada out of large excise and war taxes. All the leaders of the gang were caught and sent to prison. More than twenty of their subordinates entered pleas of guilty. Thirty-five persons were caught in this dragnet.

Important clean-ups were effected by the Secret Service in the slug racket which had resulted in a yearly loss to the owners of automatic vending machines, telephone, and traction companies of $5,000,000; in the counterfeiting of Department of Agriculture food stamps; and in the fraudulent cashing of Government checks. But perhaps the most effective work of the Secret Service was in the elimination of counterfeiting through its "Know Your Money" educational campaign. Prior to its inauguration by Chief Wilson in 1937, the public had been losing about $771,000 per year through the acceptance of counterfeit notes. In 1941 this was reduced by 88 per cent to only $91,096.

The Secret Service is convinced that this educational campaign conducted during the past four years has demonstrated that the use of modern educational methods to prevent crime are decidedly more effective in the suppression of note counterfeiting than to depend exclusively on the century old methods of prosecution and imprisonment. Hence, it was decided, at the beginning of 1941, to adopt education as a permanent program in the war on counterfeiters.

History of Our Government's Organization

The Government Printing Office has just announced the edition of a *History of the Formation of the Union under the Constitution*, which contains much valuable historical material. The principal part of the volume is a study by David M. Matteson, Historian of the Constitution Sesquicentennial Commission, of the organization of the Government under the Constitution.

This study is based on original research throughout a wide field and shows the progress of the new Government after ratification and until the new Union was in successful operation. The story is told in the words of those who participated in it, being taken from newspapers, national and state records, and correspondence. The book is illustrated by various facsimilies of material characteristic of that on which the study is based.

There are included the texts of the great documents upon which the development of our liberty is founded, from Magna Carta to the Monroe Doctrine. The edition also has incorporated, in order to give it a permanent form, the very popular *Story of the Constitution* issued several years ago by the Constitution Sesquicentennial Commission. That small volume told simply and accurately the origin of the Constitution; presented a strictly accurate print of the document itself with amendments and other state papers; showed portraits of the signers with short sketches of each man; and contained an elaborate alphabetical analysis of the Constitution and amendments along with an interesting scheme of questions and answers.

The price of the book from the Division of Public Documents, Government Printing Office is two dollars and fifty cents.

Plant Protection Established

One of the effective steps taken to protect our preparedness operations is the recent enactment into law of the measure introduced by Representative Vinson, of Georgia, as H. R. 4671, authorizing the Secretary of the Navy to establish a plant-protection force for naval shore establishments and to maintain and operate such force until June 30, 1943, unless Congress, earlier by concurrent resolution, shall declare that this force no longer is necessary.

For the purposes of the act, an appropriation of $1,000,000 annually is authorized. The force will be in charge of a civilian, appointed by the Secretary of the Navy, and will receive a salary not to exceed $7,500 per year.

The duties of this protection force will be to investigate existing or threatened espionage, sabotage, and subversive or other activities contrary to the interests of the United States and to the naval shore establishments. The force will be under the general supervision of the Director of Naval Intelligence under rules and regulations prescribed by the Secretary of the Navy.

TRADE-MARKS AND THE LANHAM BILL

[At the coming annual meeting of the House of Delegates, and perhaps on the floor of the Assembly, there may be debate as to the Lanham Bill. There will be presented a majority and minority report.

The JOURNAL *has been asked to give space to a criticism of the majority report and it has been urged that on a subject of this technical character material should be furnished in advance of the debate to the end that the debate may be better understood and more intelligently voted on. The* JOURNAL *has accordingly invited discussion by representatives of the majority and minority reports in which the three opposing views will be presented.*

Copyright law can no longer be regarded as of interest only to the specialist. It touches business so closely and so widely that almost every lawyer of general practice will find clients asking for advice on trade-mark questions. The following articles are therefore commended for perusal and consideration before the matter comes up for vote at the annual meeting. Editor]

The New Trade-Mark Bill, H. R. 5461

By WALLACE H. MARTIN*

ON July 31, 1941, Congressman Lanham introduced a revised trade-mark bill, H. R. 5461. With the possible exception of the so-called "incontestability" feature (Section 15), the revised bill adopts in principle the major amendments approved this year by the Association. The revised bill is based on the common law of trade-marks. It preserves the association of trade-marks and business good will, which earlier trade-mark bills would have destroyed. It gives an added value to registered marks, and consequently incentive to register. It more securely protects the public against deception and trade-mark owners against infringements. H. R. 5461 is believed to be fundamentally sound and entitled to the support of the Association. It represents many months' work on the part of numerous trade-mark lawyers. It is felt that every reasonable criticism of this bill can be met by proper amendment without disturbing the fundamentals of the bill. The Trade-Mark Committee is considering several suggested amendments to be submitted at the fall meeting of the Association.

The Trade-Mark Committee has heretofore felt that any provision which purported to confer incontestable rights was dangerous primarily because it was coupled with the objectionable provision that a trade-mark could be transferred apart from the good will of the business. Since this objectionable provision has been eliminated from the revised bill, there seems to be no valid reason why Section 15 should not now be accepted, provided proper precautions are taken to preserve prior rights and prevent misuses. Sections 15 and 33(b) restrict the right of incontestability. These sections contain a number of exceptions to the so-called "incontestable" right, which are believed to give adequate protection against injustices.

The revised bill provides that registration shall be constructive notice of the registrant's claim of ownership (Section 22). This provision appeared in earlier drafts of the bill. It has been approved by the Association. There seems to have been no objection to this Section, yet the criticism of Section 15 is bottomed on it. In effect, it deprives a person of the right to claim innocence if he began to use his mark subsequent to the registration of an infringed mark. It is based on the theory that public interest requires one before selecting a mark to take the precaution of looking at the marks registered in the Patent Office. This requirement is believed to be reasonable and necessary for the future development of trade-mark law in this country. If the precaution of searching the Patent Office is taken before a mark is adopted, possible conflict with Section 15 would seem to be avoided.

Constructive criticism of the bill is invited.

*Chairman of Trade-Mark Committee of Patent, Trade-Mark and Copyright Section, American Bar Association.

The Common Law of Trade-Marks Should Be Retained and Lanham Bill Defeated

By OTTO RAYMOND BARNETT*
Of the Chicago Bar

THE common law of trade-marks is so flexible, of such wide application and so equitable that the general lawyer should view with apprehension any measure which will endanger or supersede it.

And yet the Lanham Bill, which I consider would work this very result, escaped enactment at the last session of Congress by the barest margin. It passed both houses and then was held up in the Senate by a motion to reconsider.

Since then the bill has been largely rewritten by various lawyers' committees which have studied it.

The revised bill is a compromise measure, which is thoroughly unsound in the view of anyone who believes in the settled fundamentals of the common law of trade-marks and unfair competition.

It is claimed that the Lanham Bill is merely a clarification and consolidation of existing trade-mark statutes. However, it contains many radically new provisions which cannot now be found in any federal statute.

*Member of Trade-Mark Committee of Patent Section, American Bar Association.

It is a commonplace to state that any attempt to define an equitable doctrine by statute inevitably results, first, in inflexible limitations of that doctrine and, second, requires years of court interpretation before the meaning of the statutory provisions is established.

By enactment of the Lanham Bill we would depart from a long-established and understood doctrine of the law into an unexplored field of statutory interpretation.

An outstanding feature of the Lanham Bill is the perpetuation in the Patent Office of proceedings and expensive litigation to *prevent* the registration of many marks which are in actual use.

Contrary to the doctrine of the Trade-Mark Cases (100 U. S. 82) the Lanham Bill seeks to grant substantive trade-mark rights, which may become incontestable, solely as the result of *ex parte* registration in the Patent Office, thereby potentially superseding the common law rights of proprietors whose trade-marks are not so registered.

By uncontested *ex parte* registration under the provisions of the Lanham Bill, a registrant will in the federal courts establish a *prima facie* evidence as to ownership, use and exclusive right, which *prima facie* right may become conclusive and incontestable after lapse of time purely because of the registrant's *ex parte* representation.

The Lanham Bill seeks to squeeze trade-marks as nearly as possible into the practice which obtains in securing patents for invention. This concept is utterly unsound. There is no analogy between the principles affecting these wholly different types of property.

Federal trade-mark legislation should be limited to what is absolutely essential to meet requirements for trade-mark registration in foreign countries by our own nationals and to comply with the International Trade-Mark Convention so far only as the same is not inconsistent with our own established common law doctrines.

Such a bill is the Paddock Bill (H. R. 1424).

Proposed Departures from A.B.A. Draft Inequitable

By LOUIS ROBERTSON
Of the Chicago Bar

THE latest Lanham Trade-Mark Bill, H. R. 5461, departs from the A.B.A. amendments in the following important respects:

(1) Restoring incontestability beyond use and incontestable exclusiveness dropped by the A.B.A. There seems to be no off-setting tightening up of assignability over the A.B.A. draft. Sec. 22 (constructive notice) has no pertinence to the problem. Conflict cannot always be avoided by a search and one who builds up his business over a period of years in an honest belief there is no claim against him should not be confronted with a sudden incontestability of another who may have confined his use to a different territory and acquiesced in the other's use. (See Jour. Pat. Off. Soc., June, 1941, p. 455.)

(2) Permitting adverse interstate and intrastate uses of the same mark side-by-side.

(3) H. R. 5461 almost eliminates the A.B.A. common law defenses of non-confusing use of a descriptive term, and lack of secondary meaning. (Items 2 and 3 result from incontestability.)

(4) H. R. 5461 makes publishers, container makers, etc., liable under a variety of circumstances for reproducing the marks of their advertisers and customers, in spite of good faith.

If, as the author believes, there is only one reasonable side to some of these four specific items we must neither yield to, nor allow anyone else to yield to, the insistence of the special interests that almost pushed through the last Congress a bill which, after months of much appreciated improvements is still atrocious.

If there are two reasonable sides we must be especially careful because then we certainly cannot rely on the choice of the coordination committee, an unofficial group which as a whole had no obligation to the public interest. There is still hope that our own committee will prove itself superhuman, if necessary, by taking care of these defects even against the interests of its members' best clients. If not, it is hoped we will sympathetically out-vote our committee to protect thousands of manufacturers from expensive inequity, and the public from chaos. Even without the defects the bill accomplishes too little to be worth its new crop of uncertainties.

A *good* federal law can be worked out if the bar does it. Because we will never have it while submitting to the dictation of a few attorneys favoring special interests or to their "compromises" (accepted by objectors only in fear of worse dictation), mention of the interests has seemed necessary. The law *could* satisfy the Barnett idea of avoiding expensive but useless Patent Office conflicts, perhaps permitting them when both sides so desire, and at the same time provide strong federal protection for good trade-marks. It *could* establish nation-wide rights (without the Lanham Bill inequities) to the extent desirable. It *could* accomplish most that is unjustifiably claimed for the Lanham Bill.

Out Fishin'

"A feller isn't thinkin' mean
Out fishin';
His thoughts are mostly good and clean
Out fishin';
He does not knock his fellow-men,
Or harbor any grudges then;
A feller's at his finest when
Out fishin'.

"A feller's glad to be a friend,
Out fishin';
A helpin' hand he'll always lend
Out fishin';
The brotherhood of rod and line
An' sky and stream is always fine;
Men come real close to God's design
Out fishin'.

"A feller isn't plotting schemes,
Out fishin'.
He's only busy with his dreams
Out fishin'.
His livery is a coat of tan,
His creed to do the best he can;
A feller's always mostly man,
Out fishin'."

BAR ASSOCIATION NEWS

Alabama State Bar Association

THE sixty-fourth annual meeting of the Alabama State Bar Association was held in Mobile, July 11 and 12. Attendance was good, cities more than 400 miles from Mobile being particularly well represented.

De Vane K. Jones
President, Alabama
State Bar Association

Hon. S. M. Johnston, of Mobile, president of the association, presided. An address of welcome was delivered by D. R. Coley, president of the Mobile Bar Association. Dean Roscoe Pound, of the Harvard Law School, delivered an address on the subject, "Disappearance of the Law." Dean Pound integrated law, philosophy, science and economics into a most enlightening picture of our existing polity. Dean T. C. Kimbrough, of the University of Mississippi Law School, spoke on the subject, "The Lawyer and the Great Problems of Today." Lieutenant Colonel Ed C. Betts, Professor of Law, West Point Military Academy, spoke on "Constitutional Powers and Limitations Respecting the Military." The annual dinner was featured by an address delivered by Sir Louis Beale, of the British Purchasing Commission to the United States, who spoke on "Weapons of Victory."

The meeting indicated an "era of good feeling" at the Alabama Bar. When the time came to elect a new president, Hon. DeVane K. Jones, of Tuscaloosa, was nominated and elected by acclamation.

HAROLD M. COOK,
Secretary.

Virginia State Bar

THE Third Annual Meeting of the "new" or integrated Virginia State Bar was held in the Monticello Hotel, Charlottesville, Virginia, on May 23, 1941. President John S. Battle presided at the meeting.

President Battle made his report, which set out the activities of the Council since the last Annual Meeting. The report of the Secretary-Treasurer showed that there were 2,807 members in good standing for the year 1941. 2,464 were actively engaged in the practice of law, and 343 were enrolled as associate members.

Robt. T. Barton, Jr., Chairman of the *Committee to Study the Necessity for Revision of Procedure in Virginia,* made the report for this committee. The report of the committee was adopted after a rather lengthy debate. Among other things, the report provided for the introduction of a bill at the next meeting of the General Assembly of Virginia, which bill will provide for the vesting of rule-making power in the Supreme Court of Appeals of Virginia to adopt and promulgate all rules relating to civil procedure.

Lewis F. Powell, Jr., of the Richmond Bar, Chairman of the Junior Bar Conference of the American Bar Association, made a most interesting address on the Soldiers' and Sailors' Relief Act.

Guy B. Hazelgrove, of the Richmond Bar, was elected President for the year 1941-42. Chas. E. Pollard, of the Petersburg Bar, was elected Vice-President.

R. E. BOOKER,
Secretary-Treasurer.

State Bar of Texas

THE largest convention in the history of the State Bar of Texas was held in Dallas July 3-5, with the registration of 2,112 lawyers and guests. Previous election by mail of officers and directors removed politics from the sessions, and members were free to take their choice from more than fifty addresses on subjects directly concerning their profession.

Speakers included Robert P. Patterson, Under-Secretary of War; Jacob M. Lashly, President of the American Bar Association; Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio; Harvey T. Harrison, past president of the Arkansas Bar Association; and John A. Appleman of Urbana, Ill., as well as Congressman Hatton W. Sumners of Dallas.

Gordon Simpson of Tyler was installed as president, succeeding Judge Few Brewster of Temple. Claude E. Carter of Harlingen is the new vice president, and William Jarrel Smith of Pampa was elected chairman of the Board of Directors.

Gordon Simpson
President
State Bar of Texas

National defense was the keynote of the convention, with Judge Patterson talking on "Preservation of Independence," and President Lashly on the opportunity of the American Bar Association in the present situa-

tion. Private Donald Wright of Fort Sill, Okla., addressed the Junior Bar Section on "O P M and O C D."

Meetings of the Texas section of the American Bar Association's special committee on improving the administration of justice, offering fifteen addresses on various subjects, were well attended. The convention closed Saturday night, July 5, with the annual banquet, where Chief Justice Weygandt spoke on "Our Profession's Challenge."

WILLIAM B. CARSSOW,
Secretary.

Delaware State Bar Association

THE 1941 annual meeting and dinner of the Delaware State Bar Association was held at Rehoboth on July 25. Over one hundred members of the association were present. Edmund Ruffin Beckwith, Chairman of the National Defense Committee of the American Bar Association, gave an address on the responsibilities of the organized bar during the present national emergency. Hon. Daniel J. Layton, Chief Justice of the Supreme Court of Delaware, spoke on "The Effect of the Brief on the Judicial Opinion."

The officers for the year 1941-42 are: President, James R. Morford, Wilmington; Secretary, William Marvel, Wilmington; Treasurer, Thomas C. Frame, Dover.

WILLIAM MARVEL
Secretary

Pennsylvania Bar Association

FIVE hundred and twenty members of the Pennsylvania Bar Association convened at Bedford Springs Hotel on June 25 for the 47th Annual Meeting of the Association. In addition, eighty-eight ladies registered. The President, Hon. Wm. H. Hargest, devoted his address to a report of the activities of the Association in National Defense, together with an analysis of the field of Administrative Law. Hon. Jacob M. Lashly, President of the American Bar Association delivered the Annual Address. Hon. W. Walter Braham presented a paper on "The Lawyer in a Changing World."

At the banquet, Justice Owen J. Roberts of the Supreme Court of the United States and Hon. George Wharton Pepper, President of the American Law Institute, were the speakers.

The officers for 1941-42 are: Hon. Fred B. Gernerd of Allentown, President; John C. Arnold of Clearfield, Vice-President; John McI. Smith, Secretary; Fidelity Philadelphia Trust Company, Treasurer.

JOHN McI. SMITH
Secretary

Bill of Rights Committee

ONE of the significant activities of the Association is that being carried on by the Special Committee on the Bill of Rights, of which George I. Haight of Chicago is Chairman. Among other things, the Committee publishes *The Bill of Rights Review*, a quarterly magazine to which the JOURNAL has previously (March, 1941) called attention. We publish herewith a photograph indicating the radio activities of the Bill of Rights Committee. Chairman Haight had made two addresses in Los Angeles on July 7 and July 20, at least one of which the Lawyers' Club of Los Angeles arranged to have broadcast.

Lawyers Club, Los Angeles, Calif. Left to right: Loyd Wright, President of the State Bar of California; George I. Haight, of Chicago, Chairman of the Special Committee on Bill of Rights of the ABA; and Jay Maidel, of The Lawyers Club of Los Angeles.

PROPOSED AMENDMENT
to the Constitution of the American Bar Association

To be Presented and Acted Upon at Its Sixty-fourth Annual Meeting at Indianapolis, September 29 to October 3

TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION AND OF THE HOUSE OF DELEGATES:

Notice is hereby given that Harry P. Lawther, of Dallas, Texas, a member of the American Bar Association, has filed with the Secretary of the Association the following proposed amendments to the Constitution of the Association:

Amend Article VIII by striking out Sections 1 and 2 of said Article and substituting therefor the following:

"Section 1. Nominations by Petition.—Nominations for President, Secretary and Treasurer of the Association; for Chairman of the House of Delegates; and for members of the Board of Governors for that year shall be by petition signed by ten members of the House of Delegates (no more, no less) for President, Secretary, Treasurer and Chairman of the House; and by five members of the House of Delegates (no more, no less) for each member of the Board of Governors; said petitions shall be filed with the Secretary of the Association and shall by him be published in the American Bar Association Journal not more than sixty and not less than forty days before the next annual meeting of the House of Delegates; and shall be by him certified to the House of Delegates upon the first day of the next annual meeting, upon which day the election of the officers shall be held."

Amend Article VIII by changing the numbers of Sections 3, 4, and 5 to Sections 2, 3, and 4, respectively.

HARRY S. KNIGHT,
Secretary.

CURRENT EVENTS

Bar Examinations

THE JOURNAL has received the April, 1941, number of *The Bar Examiner*, a magazine published by the National Conference of Bar Examiners. It contains an interesting article by John K. Clark, President, New York State Board of Law Examiners, and Chairman of the National Conference of Bar Examiners, entitled *Developments During 20 Years of Bar Examinations*. The article gives an authentic history of the last two decades in regard to the topic discussed.

This issue of *The Bar Examiner* contains also interesting statistics about admissions to the bar. The "batting averages" for the year 1940 in typical states are:

State	Total Taking	Total Passing	Percent Passing
Alabama	42	20	48%
California	828	417	50%
Illinois	876	571	65%
Massachusetts	1,277	358	28%
Minnesota	214	98	46%
Mississippi	85	57	67%
New York	2,993	1,369	46%
Pennsylvania	543	331	61%
Texas	788	343	44%

There is also given a complete directory of Bar Examiners for the various states. A "note" announces that a *Manual for Bar Examiners* prepared by the Conference may be had at a nominal price and can be ordered from Dean Bernard C. Gavit, Secretary, Association of American Law Schools, Indiana University, Bloomington, Ind.

Legal Aid

THE JOURNAL is in receipt of The *Legal Aid News Letter* for July, issued by the National Association of Legal Aid Organizations, 25 Exchange Street, Rochester, New York. It contains the program for the 19th Annual Legal Aid Conference to be held September 17 to 19 at Baltimore. Typical subjects for discussion are: "Problems of Legal Aid Services in Smaller Communities," discussion led by Hon. H. Hamilton Hackney, Judge, Juvenile Court of Maryland; "The Treatment of Domestic Relations Problems," discussion led by William H. Savin of the Washington, D. C. Family Service Association and Arthur J. Harvey of the Albany Legal Aid Society.

Among other things the news letter contains the following item:

> ***ABA Journal***
>
> "After more than 20 years of service on the Legal Aid Committee of the American Bar Association, Reginald Heber Smith, of Boston, author of *Justice and the Poor* and devoted advocate of organized legal aid, has been elected to the Editorial Board of the Journal of that Association. It is a fitting recognition of his many abilities and we can be very sure that the cause of legal aid will continue to find expression in that publication."

Commercial Law League

THE Commercial Law League held its Annual Convention in New York City July 22 to 24. Judge Abraham Lieberman of New Jersey was elected president of the League, succeeding Harold B. Doyle, of Youngstown, Ohio. Judge Lieberman served as vice president during the past year.

Also elected were Henry L. Fist, Tulsa, Okla., vice president; Thad M. Talcott, Jr., South Bend, Ind., re-elected for a twelfth term as treasurer; Benjamin S. Lurie, Columbus, Ohio, recording secretary; and P. L. Steinberg, Cleveland, Ohio, and Harry L. Jenkins, Philadelphia, Pa., as members of the executive committee.

The new president was born in Union City, N. J., educated in the public schools there and at New York University. He studied law at N. Y. U. law school, graduating with a degree of LL.B. He was admitted to the bar of New Jersey as an attorney at law in 1923, and as counselor at law in 1926.

Judge Lieberman was appointed to the Weehawken police court on Jan. 1, 1932, and is still serving there. He is also a member of the American, Federal, New Jersey State, and Hudson County bar associations and the North Hudson Lawyers Club.

A Century of Probation

[*Reprinted in Chicago Daily Law Bulletin, from Dallas Morning News*]

FITTING tribute has been given this year to John Augustus, the humble Boston shoemaker who, a century ago, began a great movement in the reformation of offenders. In 1841, Augustus took from a court, for a period of probation, a man who, under his care and with his friendship, became again a useful citizen. The ideals that inspired John Augustus are those that should motivate the widely organized probation movement today.

Probation has been especially successful in the federal courts, which now place about 13,000 persons a year on probation and have a total of about 57,000 under supervision of probation officers. In the states, results have varied greatly. Probation has succeeded in those states that impose ample supervision by trained probation officers. It has had indifferent or negative results where supervision has been neglected or has been left to those whose qualifications were mainly political.

There is no room here for mere place-hunters or political derelicts, Charles E. Hughes noted shortly before his retirement as chief justice of the Supreme court. "Probation officers should be appointed solely on the basis of merit, without regard to political associations. Training, experience and traits of character appropriate to the specialized work of a probation officer should in every instance be deemed essential qualifications. Good intentions and humanitarian impulses are not enough."

The tasks ahead in probation include increasing personnel to reduce the individual's case load, raising standards through good appointments and education in service and offering compensation sufficient to attract well qualified persons. These steps promise better results than ever in the rehabilitation of those who have strayed into anti-social paths.

Radio "Courts"

BAR association committees in various parts of the country have been concerned about the use of the word "court" as part of the title of certain radio programs and the possibility of the public being misled into believing that the program emanated from a real judicial tribunal.

The matter was called to the attention of the Committee on Unauthorized Practice of the Law, which held a series of meetings and conferences with respect thereto, with representatives of broadcasting companies and of the National Association of Broadcasters.

As a result, the title of a program known as "Court of Missing Heirs" has been changed to "Are You a Missing Heir?". In a spirit of full cooperation with the Bar, the National Association of Broadcasters, on July 28, 1941, sent out to all of its member stations a communication concerning this matter, specifically saying, among other things:

> "The American Bar Association's Committee on Unauthorized Practice of the Law, of which Edwin M. Otterbourg, of New York is Chairman, has, at several of its meetings, been asked to consider the problem and has evinced every desire to bring about cooperation between the broadcasters and local and state bar associations who have been complaining about certain programs. At the last meeting of the American Bar Association Committee held in Chicago on March 16, 1941, Mr. Joseph L. Miller attended on our behalf, and the Committee gave as its opinion that "a program should neither give or offer to give legal advice nor by title or substance represent or lead the public to believe that it emanates from a court or is a part of the judicial system."

We Must Be Fair

(From the New York Times)

THERE is no reason to doubt the "wisdom, sagacity and fairness" of the local, state and federal law enforcement officers to whom Judge Learned Hand spoke at a special meeting here recently. But Judge Hand was timely in reminding them that these qualities are as important as courage just now. One would like to see his words, or some of them, posted in every police office in the country, from FBI headquarters down. These, for instance:

"There is quite as much danger in overdoing fears, excitement and punishments that comes from a state of peril as there is from neglecting to take necessary remedial steps. I ask you to remember that you are protecting the greatest nation in the world. The question is, can we preserve the essentials of democracy and the essence of freedom?

"We should assure every one that the elements of justice will be preserved, because once people feel that rumors and idle, foolish suspicions of enemies may land them in concentration camps, disunity sets in.

"Spies and saboteurs are undoubtedly operating in this country. They will become more dangerous as our defense effort mounts in intensity. Citizens can help defeat them by reporting suspicious actions to the police. But citizens must not take law into their own hands, and police officers must scrupulously respect the freedoms we are preparing to defend. Let it be remembered that the deepest loyalty may sometimes speak with a foreign accent, wear shabby clothes and trim its whiskers in an alien fashion. The most dangerous spies and saboteurs are probably those who know best how not to attract attention to themselves by loose talk or eccentric actions."

Rockefeller Foundation

THE Annual Report of the Rockefeller Foundation shows that during 1940 gifts of the Foundation for public health and other similar purposes amounted to $9,854,497. Of this amount 77% was for work in the United States and 23% abroad. Parts of President Fosdick's review are of deep interest, not only to the public in general, but also to lawyers.

In discussing "The Challenge to the Social Sciences," President Fosdick makes some thought-provoking comment when he says:

> In such an hour as this the social sciences may seem like frail reeds to lean upon. Never has the skein of human relations been so tangled or the course of cause and effect so confused. The world society of the twentieth century with its intricate web of interdependence among all the millions of men presents a challenge to disciplined intelligence such as no generation has ever faced. In this shrunken world the emotional potential is enormously higher because we share with once distant countries their invasions, their bombings, and their starvation; but the means of knowing and understanding are vastly more difficult and complicated. We are emotionally sensitized, and therein lies the hope of a true brotherhood of man; we are intellectually unprepared, and therein lies the danger of catastrophe.
>
> But for reason to surrender to bafflement or for hope to lose itself in panic flight is unthinkable. The race with confusion and complexity may be desperately close, but intelligence will still persist in trying to find answers to the urgent questions which confront our time. How shall we govern ourselves in a modern technological society? How shall we manage our vast productive capacity? How shall we reconcile the contradiction between the character of our political institutions and the possibilities of our economic achievement? How can the social adjustment of millions of human beings be arranged with less frustration and more harmony and justice? How can peace among nations be established? These are the questions that are put to the social sciences—not for specific answer, but for clarification. The intellectual choices which face us are now so blurred that moral judgments cannot easily be made. We need the light which more exact knowledge would bring.
>
> What have the economists and political scientists to report in relation to improved facilities for observing and interpreting the social scene? What would a wise and provident society direct a foundation to do with funds available for social studies? Let it be admitted at once that there is no capacity in the social sciences for insuring quick results. There is no fast road to the solution of social problems.

The Battle for Shorts

[*From the Kansas City Times. Reprinted in Chicago Daily Law Bulletin.*]

WE OBSERVE with interest that the celebrated Nettleton, Ark., shorts case has been reversed in the higher courts of Arkansas.

The Nettleton case arose when the mayor of that somewhat puritanical town, under an 1837 statute prohibiting "public exhibition of nudity" caused the arrest and fining of a 19-year-old girl for wearing shorts. The girl appealed to the circuit court and that body set aside the fine and dismissed the charge. Thus progresses the cause of woman's emancipation.

But we don't object—as long as the sunworshippers are young and comely at least. The rest of the world has accepted shorts and Nettleton, Ark., may as well fall in line.

Current Federal and State Statutes—1941

A Directory of Statutes, Revisions, Codes and Compilations

LAWYERS all over the country have occasion from time to time to consult the statutes of other states. Frequently this is for some purpose which does not justify writing to a correspondent in another state, or is an emergency matter that will not permit time for that. Generally the lawyer does not have the "foreign" state statutes in his office and goes to the nearest law library for this purpose. He is likely to be unacquainted with the statutes of the state concerned, and is accordingly confronted with a number of questions.

What is the correct name of the authorized publication of the state statutes in question?

If there is more than one publication (as is not unlikely) what are the names of the various sets of statutes?

How complete and up-to-date are these compilations?

Is there an annotated set of statutes for the state?

How can the lawyer be sure that he has the names of all the major publications which are generally in use by the local bar?

These and other questions are constantly arising in the experience of many lawyers, whether in metropolitan cities or in the more remote areas.

The judges of the courts too are often confronted with similar problems. The reviewing courts particularly need to know about the statutes from "foreign" states. Lawyers' briefs frequently cite compilations from outside states and quote from them. How are the judges to know whether the compilations cited are authentic? How are the courts to know whether the publications cited are the latest editions?

The JOURNAL from time to time has been made aware of these problems about "foreign" statutory compilations as they are presented to the bench and bar of the country. From time to time come requests from practitioners who are in the dark about the latest and most reliable statutory publications in some other state. With this frequently recurring situation in mind, the JOURNAL has had the following up-to-date inventory made of the accepted and recognized statutory publications for all the states in the Union, as well as of the federal statutes. The list, brought down to date as of July 1, 1941, has been submitted to all the major law publishing houses and has been corrected by them.

It is hoped that this complete statutory directory, giving the compilations for each of the 48 States and the United States, may be of help to the profession.

United States

The Code of the Laws of the United States of America, in force January 3, 1935 (1934 Ed.), and Supplement V to 1938. (U.S.C.)
Printed and for sale by Government Printing Office.

United States Code Annotated (U.S.C.A.). 65 vols. Supplemented by cumulative pamphlets and annual pocket parts. Congressional Service Pamphlets during sessions of Congress.
Published by West Publishing Co., St. Paul, Minn. and Edward Thompson Company, Brooklyn, N. Y.

Federal Code Annotated (F.C.A.). 16 vols. Pocket Parts.
Published by Bobbs-Merrill Co., Indianapolis.

Mason's United States Code Annotated. 3 vols. (1926) and Supplements. Quarterly pamphlets and bound volumes from time to time.
Published by Mason Publishing Company, St. Paul, Minn.

Alabama

Code of Alabama 1940, 10 vols., with pocket parts.
Published jointly by The Harrison Co., West Publishing Co., and The Michie Co. For sale by Secretary of State, Montgomery, Alabama.

Alaska

Compiled Laws of Alaska 1933, 1 vol.
Published by Daily Alaska Empire of Juneau. May be obtained from Auditor of Alaska, Juneau.

Arizona

Arizona Code, Annotated 1939. Official Edition. 6 vols.
Published by Bobbs-Merrill Co., Indianapolis.

Arkansas

Pope's Digest of the Laws of Arkansas, Annotated 1937. 2 vols.
Obtainable from Department of State, Little Rock, Ark.

1940 Cumulative Annotated Supplement. 1 vol. Kept to date with Annotated Cumulative Supplemental Service.

Crawford's Civil Practice Code 1934. 1 vol.
Published by Thomas Law Book Co., St. Louis, Missouri.

California

Deering's Civil Code 1941. 1 vol.

Deering's Code of Civil Procedure and Probate Code 1941. 1 vol.

Deering's Penal Code 1941. 1 vol.

Deering's Political Code 1937.

Deering's 1937 Codes of California, "One Star" volume.

Deering's 1937 Codes of California, "Two Star" volume.

Deering's 1939 Codes of California, "Three Star" volume.

Deering's 1937 General Laws, 2 volumes.

Deering's 1939 Supplement to all 1937 Deering's Codes and General Laws. 1 vol.

Deering's 1941 Supplement to all 1937 Codes, General Laws and 1939 Supplement. 1 vol.

Treadwell's Anno. Const. of California 1931 with 1939 Supplement.
Published by Bancroft-Whitney Co., San Francisco, Cal.

Hillyer's Civil Code 1935. 1 vol. with 1937-41 Pocket Part.

Hillyer's Code of Civil Procedure and Probate Code 1935. 1 vol. with 1937-41 Pocket Part.

Hillyer's Penal Code 1935. 1 vol. with 1937-41 Pocket Part.
Published by Bender-Moss Co., San Francisco, Cal.

Canal Zone

1934 Canal Zone Code. 1 vol.
Obtainable from Superintendent of Documents, Washington, D. C.

Supplement No. 1 to the Canal Zone Code and Appendix 1938.
Obtainable from the Chief of Office, The Panama Canal, Washington, D. C.

Colorado

1935 Colorado Statutes Annotated. 5 vols. Official Edition. Kept up to date with Pocket Part Service. Published annually.

1941 Replacement Volume I. Annotated Rules of Civil Procedure.
Published by Bradford-Robinson Printing Co., Denver, Colo. and The Michie Co., Charlottesville, Virginia.

Connecticut

Connecticut General Statutes 1930. 2 vols. and index vol. Also obtainable in one volume and index vol. Kept to date with supplements published after each session of the legislature.

1931-1935 Cumulative Supplement. 1 vol.

1937-1939 Cumulative Supplement. 1 vol.

1941 Cumulative Supplement. 1 vol.

Connecticut Practice Book 1934. 1 vol.
All of the above obtainable from E. E. Dissell Publishing Co., Hartford, Conn.

Delaware

1935 Revised Code of Delaware. 1 vol.
Obtainable from Delaware State Library, Dover, Delaware.

Dist. of Columbia

District of Columbia Code 1941. 2 vols.
Obtainable from Government Printing Office, Washington, D. C.

Florida

Compiled General Laws of Florida 1927. 6 vols. Also a one volume compact edition.

Permanent Supplement 1936. 6 vols.

1940 Supplement. 1 vol.
Published by The Harrison Company, Atlanta, Georgia.

Florida Statutes 1941. Adopted by Legislature 1941. To be published by State. 2 vols. Not annotated. *A volume of Annotations to be published by State in 1942.*

Georgia

Georgia Code 1933. 1 vol.

Code of Georgia Annotated 1933. 34 books. Kept to date with cumulative pocket parts issued after each session of the legislature.
Published by The Harrison Company, Atlanta, Georgia.

Hawaii

Revised Laws of Hawaii 1935.
Obtainable from Secretary of Hawaii, Honolulu.

Idaho

Idaho Code 1932. 4 vols. Official Edition.
Published by Bobbs-Merrill Co., Indianapolis.

1940 Supplement to the Idaho Code 1932. 1 vol.
Published by Courtright Publishing Co., Denver, Colo.

Illinois

Illinois Revised Statutes. State Bar Edition 1941. 1 vol. (Smith-Hurd classification).
Published by Burdette Smith Co., Chicago, Ill.

Smith-Hurd Illinois Annotated Statutes. 35 vols. Kept to date with Pocket Part and Pamphlet Supplements.
Published by West Publishing Co., St. Paul, Minn. and Burdette Smith Co., Chicago, Ill.

Jones Illinois Statutes Annotated. 30 vols. Kept to date with Pocket Parts and Pamphlet Supplements.
Published by Callaghan & Co., Chicago, Ill.

FEDERAL AND STATE STATUTES

Indiana

Baldwin's Indiana Statutes Annotated, 1934. 1 vol. Kept to date with Semi-Annual Pamphlet Service.
Published by Banks-Baldwin Law Publishing Co., Cleveland, Ohio.
Burns' Indiana Statutes, Annotated 1933-34. 12 vols. Kept to date with Semi-Annual Pocket Parts.
Published by Bobbs-Merrill Co., Indianapolis.

Iowa

Code of Iowa 1939. 1 vol.
Obtainable from Superintendent of Printing, Des Moines, Ia.
Mason's Annotations to Code of Iowa 1925-1940. 1 vol. Kept to date by quarterly pamphlets and annual pocket parts.
Published by Mason Publishing Co., St. Paul, Minn.

Kansas

1935 General Statutes of Kansas. 1 vol.
1939 Supplement. 1 vol.
Obtainable from Secretary of State, Topeka, Kan.

Kentucky

Carroll's Official Kentucky Statutes, Annotated, Baldwin's 1936 Revision. 1 vol. Kept to date with pamphlet service.
Carroll's Official Kentucky Codes—Civil and Criminal, Baldwin's Revision 1938. 1 vol. With annual Supplemental Pocket Part.
Published by Banks-Baldwin Law Publishing Co., Cleveland, Ohio.

Louisiana

Dart's Louisiana Constitution 1932. 1 vol.
Dart's Louisiana Civil Code 1932. 1 vol.
Dart's Louisiana Code of Civil Practice. 1 vol. Recompiled 1941.
Dart's Louisiana Criminal Code and Procedure, 1932. 1 vol.
Dart's Louisiana General Statutes 1939. 6 vols.
General Index. 1 vol. 1941.
All kept to date by 1940 Pocket Parts.
Published by Bobbs-Merrill Co., Indianapolis.

Maine

Revised Statutes of Maine 1930.
Obtainable from Department of State, Augusta, Maine.

Maryland

Annotated Code of Public General Laws of Maryland 1939. 2 vols.
Code of Public Local Laws 1930. 2 vols.
Obtainable from Horace E. Flack, Director, Department of Legislative Reference, City Hall, Baltimore, Md.

Massachusetts

Massachusetts General Laws, 1932 Tercentenary Edition. 2 vols. and Index vol.
Obtainable from Department of the Secretary, Public Document Division, Boston.
Massachusetts Annotated Laws. 10 vols. Kept to date by Pocket Parts and Pamphlet Supplements.
Published by Lawyers Co-operative Publishing Co., Rochester, N. Y.

Michigan

Michigan Compiled Laws 1929. 4 vols.
Obtainable from Secretary of State, Lansing, Mich.
Michigan Statutes Annotated. 27 vols. Kept to date by quarterly pamphlets and Annual Pocket Parts.
Published by Callaghan & Co., Chicago, Ill.
Michigan Compiled Laws. Vol. 5—Mason's 1940 Cumulative Supplement.
Michigan Compiled Laws. Vol. 6—Mason's 1941 (Non-Cumulative) Supplement. Kept up to date by quarterly pamphlets.
Published by Mason Publishing Co., St. Paul, Minn.

Minnesota

Mason's Minnesota Statutes 1927. Vols. 1 and 2.
1940 Cumulative Supplement. Vol. 3.
1941 (Non-Cumulative) Supplement. Vol. 4.
Kept up to date by quarterly pamphlets.
Published by Mason Publishing Co., St. Paul, Minn.

Mississippi

Mississippi Code 1930. 2 vols.
1938 Cumulative Supplement. 1 vol.
Published by The Harrison Co., Atlanta, Ga.

Missouri

Revised Statutes of Missouri 1939. 3 vols.
Obtainable from Secretary of State, Jefferson City, Mo.
Missouri Statutes Annotated, with annual pocket parts and cumulative current pamphlets. 15 vols.
Published jointly by Vernon Law Book Company, Kansas City, Mo. and West Publishing Co., St. Paul, Minn.
Annotated cumulative supplemental service to Missouri Revised Statutes 1939.
Published by Thomas Law Book Company, St. Louis, Missouri.

Montana

Montana Revised Codes 1935. 5 vols., with 1939 Pocket Parts Supplement.
Obtainable from State Publishing Co., Helena, Mont.
1939 Annotated Cumulative Supplement to 1935 Revised Codes. 1 vol.
Published by Courtright Pub. Co., Denver, Colo.

Nebraska

Compiled Statutes of Nebraska 1929. 1 vol.
Obtainable from Department of State, Lincoln, Neb.
1939 Supplement. 1 vol.
Published by Supplement Publishing Co., Lincoln, Neb.

Nevada

Nevada Compiled Laws, 1929. 6 vols., with 1938 Pocket Parts Supplement. 1941 Supplement in preparation.
Published by Bender-Moss Company, San Francisco, Cal.

New Hampshire

New Hampshire Public Laws 1926. 2 vols.
Obtainable from Secretary of State, Concord, N. H.

New Jersey

Revised Statutes of New Jersey 1937. 5 vols.
Obtainable from Department of State, Trenton, N. J.
New Jersey Statutes Annotated. 57 vols. plus 2 vol. Index. Kept to date by cumulative pamphlets and annual pocket parts.
Published by West Publishing Co., St. Paul, Minn.

New Mexico

New Mexico Statutes 1929. 1 vol.
1938 Supplement. 1 vol.
Published by Courtright Publishing Co., Denver, Colo.
New Mexico Official Statutes 1941. In preparation.
Published by Bobbs-Merrill Co., Indianapolis.

New York

Thompson's Laws of New York. 4 vols. and Cumulative Supplement.
McKinney's Consolidated Laws of New York Annotated. Kept to date with cumulative pamphlets and annual pocket parts.
Published by Edward Thompson Co., Brooklyn, N. Y.
Baldwin's New York Consolidated Laws Annotated 1938. 2 vols. with Semi-Annual-Pamphlet Service.
Cahill's Consolidated Laws of New York 1930. 1 vol. with Cumulative Supplements issued annually.
Also 8 vols. Lifetime Edition 1938. Kept to date with cumulative pocket parts.
Published by Banks-Baldwin Law Publishing Company, Cleveland, Ohio.

North Carolina

North Carolina Code 1939. 1 vol.
Published by The Michie Co., Charlottesville, Va.

North Dakota

North Dakota Compiled Laws 1913. 2 vols.
1925 Supplement. 1 vol.
Published by Lawyers Co-operative Publishing Co., Rochester, N. Y.

Ohio

Throckmorton's Ohio Code, Annotated, 1940. 1 vol. (also 2 vol. ed.) Kept to date with Baldwin s Ohio Code Service. Issued semi-annually.
Published by Banks-Baldwin Law Publishing Co., Cleveland, Ohio.
Page's Ohio General Code, Lifetime Edition. 12 vols. with semi-annual pocket parts.
Published by W. H. Anderson Co., Cincinnati, Ohio.

Oklahoma

Oklahoma Statutes Annotated, 25 vols., with Cumulative Pamphlets and Annual Pocket Parts.
Published by The Lawyers Co-operative Pub. Co., Rochester, N. Y. and West Publishing Co., St. Paul, Minn.
Oklahoma Statutes, Official Edition 1931. 2 vols.
1940 Supplement. 2 vols.
Published by Harlow Publishing Corp., Oklahoma City, Okla.

Oregon

Oregon Compiled Laws Annotated, 1940. 10 vols. with Annual Pocket Parts.
Published by Bancroft-Whitney Co., San Francisco, Cal.

Pennsylvania

Purdon's Pennsylvania Statutes Annotated, Permanent Edition with Pamphlets and Annual Pocket Parts.
Purdon's Pennsylvania Statutes, Compact Edition. 1 vol. 1936.
Published jointly by George T. Bisel Co., Philadelphia, Pa.; Soney & Sage, Newark, N. J.; and West Publishing Co., St. Paul, Minn.

Rhode Island

Rhode Island General Laws 1938. 2 vols.
Obtainable from Secretary of State, Providence, R. I.

South Carolina

South Carolina Code 1932. 4 vols.
Published by The Michie Co., Charlottesville, Va.
Supplements published every 2 years, 1934, 1936, 1938. 1 vol. each.
South Carolina Reports (Opinions of Supreme Court of S. C.). 4 vols. each year.
Published by The R. L. Bryan Company, Columbia, S. C.

South Dakota

South Dakota Code 1939. 4 vols.
Obtainable from Secretary of State, Pierre, S. D.

Tennessee

Michie's Tennessee Code 1938. 1 vol. with 1939 and 1940 Pamphlet Supplements.
Williams Annotated Tennessee Code. 8 vols. with Annual Pocket Parts.
Published by The Michie Co., Charlottesville, Va.

Texas

Vernon's Annotated Texas Statutes. Kept to date by Cumulative Pamphlets and Annual Pocket Parts.
Vernon's Texas Statutes, Centennial Edition, 1936. 1 vol. and 1939 Cumulative Supplement. 1 vol.
Published by Vernon Law Book Co., Kansas City, Mo.

Utah

Utah Revised Statutes 1933. 1 vol.
Supplemental Session Laws, 1933, 1935, 1936, 1937, 1939, 1941. 2nd SS 1941. 1 vol. each.
Published by Inland Printing Co., Kaysville, Utah.
1939 Supplement. 1 vol.
Published by Courtright Publishing Co., Denver, Colo.

Vermont

Vermont Public Laws, 1933. 1 vol.
Obtainable from Vermont State Library, Montpelier, Vt.

Virginia

Virginia Code 1936. 1 vol. (also 2 vol. ed.) with Cumulative Supplement. 1 vol.
Published by The Michie Co., Charlottesville, Va.

Washington

Pierce's Code Annotated 1939. 2 vols.
Published by Frank Pierce, Seattle, Wash.
Remington's Revised Statutes of Washington Annotated 1932. 13 vols., including vol. 7A, with Annual Pocket Parts.
1941 Supplement.
Published by Bancroft-Whitney Co., San Francisco, Cal.

West Virginia

West Virginia Code 1937. 1 vol.
1939 Supplement. 1 vol.
Published by The Michie Co., Charlottesville, Va.

Wisconsin

Wisconsin Statutes 1939. 1 vol.
Wisconsin Annotations 1930. 1 vol.
Obtainable from Bureau of Purchases, Madison, Wis.
Mason's Wisconsin Annotations 1930-1938. 1 vol. Kept to date by quarterly pamphlets.
Published by Mason Publishing Company, St. Paul, Minn.

Wyoming

Wyoming Revised Statutes, 1931. 1 vol.
Obtainable from Secretary of State, Cheyenne, Wyo.
1940 Supplement. 1 vol.
Published by Courtright Publishing Co., Denver, Colo.

SEA WARFARE IN THE ATLANTIC—1776

THE FIRST CHIEF JUSTICE AS PRESIDENT OF THE CONTINENTAL CONGRESS

In CONGRESS,

WEDNESDAY. April 3, 1776.

INSTRUCTIONS *to the* COMMANDERS *of Private Ships or Veſſels of War, which ſhall have Commiſſions or Letters of Marque and Repriſal, authoriſing them to make Captures of Britiſh Veſſels and Cargoes.*

I.

YOU may, by Force of Arms, attack, ſubdue, and take all Ships and other Veſſels belonging to the Subjects of the King of Great-Britain, on the High Seas, or between High-water and Low-water Marks, except Ships and Veſſels bringing perſons who intend to ſettle and reſide in the United Colonies, or bringing Arms, Ammunition or warlike Stores to the ſaid Colonies, for the Uſe of ſuch Inhabitants thereof as are Friends to the American Cauſe, which you ſhall ſuffer to paſs unmoleſted, the Commanders thereof permitting a peaceable Search, and giving ſatisfactory Information of the Contents of the Ladings, and Deſtinations of the Voyages.

II.

You may, by Force of Arms, attack, ſubdue, and take all Ships and other Veſſels whatſoever, carrying Soldiers, Arms, Gun-powder, Ammunition, Proviſions, or any other contraband Goods, to any of the Britiſh Armies or Ships of War, employed againſt theſe Colonies.

III.

You ſhall bring ſuch Ships and Veſſels as you ſhall take, with their Guns, Rigging, Tackle, Apparel, Furniture and Ladings, to ſome convenient Port or Ports of the United Colonies, that Proceedings may thereupon be had in due Form, before the Courts which are or ſhall be there appointed to hear and determine Cauſes civil and maritime.

IV.

You or one of your Chief Officers ſhall bring or ſend the Maſter and Pilot, and one or more principal Perſon or Perſons of the Com; any of every Ship or Veſſel by you taken, as ſoon after the Capture as may be, to the Judge or Judges of ſuch Court as aforeſaid, to be examined upon Oath, and make Anſwer to the Interrogatories which may be propounded, touching the Intereſt or Property of the Ship or Veſſel and her Lading; and at the ſame Time you ſhall deliver or cauſe to be delivered to the Judge or Judges, all Paſſes, Sea Briefs, Charter Parties, Bills of Lading, Cockets, Letters, and other Documents and Writings found on Board, proving the ſaid Papers, by the Affidavit of yourſelf or of ſome other Perſon preſent at the Capture, to be produced as they were received, without Fraud, Addition, Subduction or Embezzlement.

V.

You ſhall keep and preſerve every Ship or Veſſel and Cargo by you taken until they ſhall, by Sentence of a Court properly authoriſed, be adjudged lawful Prize, or acquitted—not ſelling, ſpoiling, waſting, or diminiſhing the ſame, or breaking the Bulk thereof, nor ſuffering any ſuch Thing to be done.

VI.

If you, or any of your Officers or Crew, ſhall, in cold Blood, kill or maim, or, by Torture or otherwiſe, cruelly, inhumanly, and contrary to common Uſage and the Practice of civilized Nations in War, treat any perſon or Perſons ſurprized in the Ship or Veſſel you ſhall take, the Offender ſhall be ſeverely puniſhed.

VII.

You ſhall, by all convenient Opportunities, ſend to Congreſs written Accounts of the Captures you ſhall make, with the Number and Names of the Captives, Copies of your Journal from Time to Time, and Intelligence of what may occur or be diſcovered concerning the Deſigns of the Enemy, and the Deſtinations, Motions and Operations of their Fleets and Armies.

VIII.

One Third, at the leaſt, of your whole Company ſhall be Land-men

IX.

You ſhall not ranſome any Priſoners or Captives, but ſhall diſpoſe of them in ſuch Manner as the Congreſs, or if that be not ſitting in the Colony whither they ſhall be brought, as the General Aſſembly, Convention, or Council or Committee of Safety of ſuch Colony ſhall direct.

X.

You ſhall obſerve all ſuch further Inſtructions as Congreſs ſhall hereafter give in the Premiſes, when you ſhall have Notice thereof.

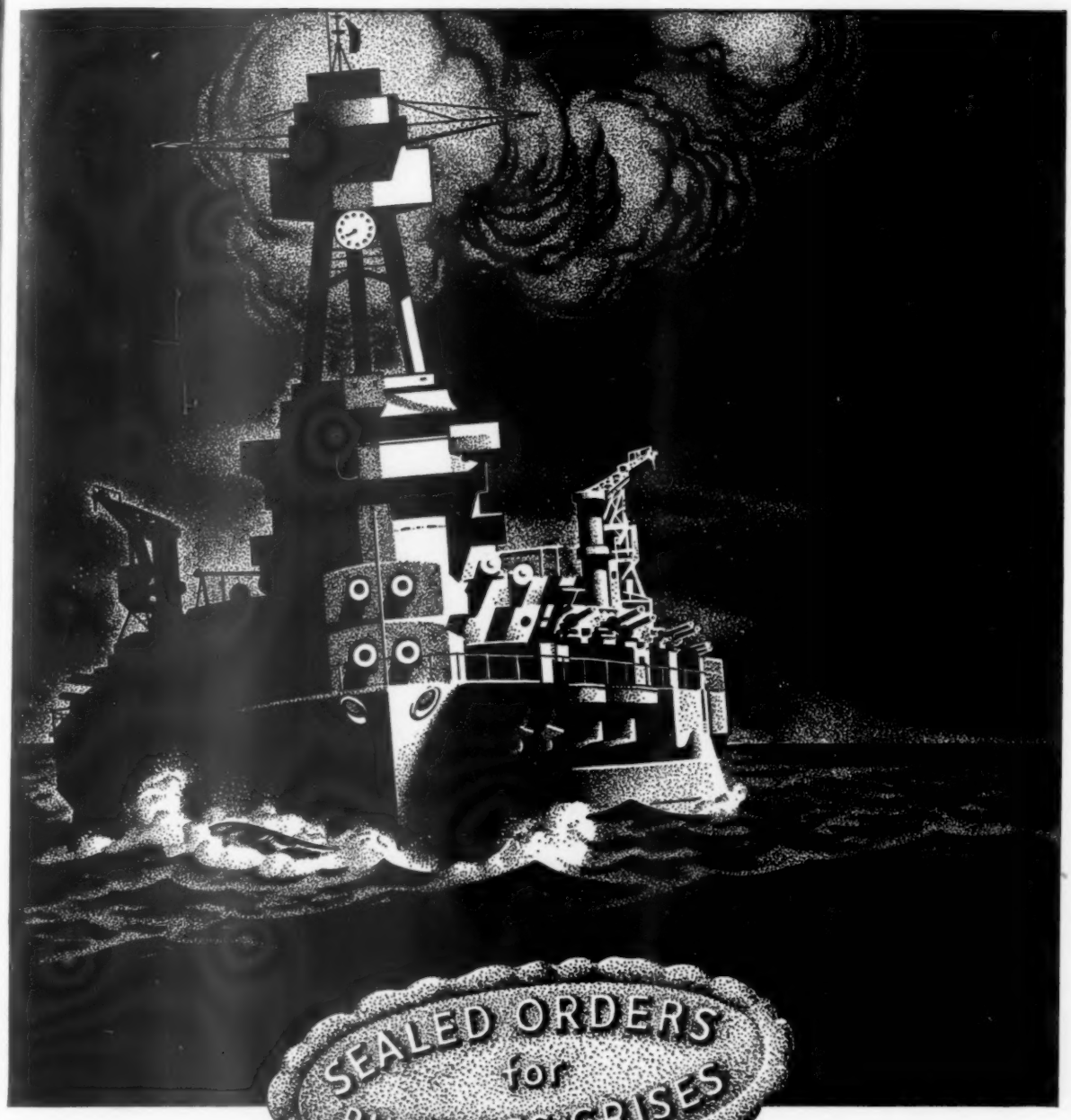
XI.

If you ſhall do any Thing contrary to theſe Inſtructions, or to others hereafter to be given, or willingly ſuffer ſuch Thing to be done, you ſhall not only forfeit your Commiſſion, and be liable to an Action for Breach of the Condition of your Bond, but be reſponſible to the Party grieved for Damages ſuſtained by ſuch Malverſation.

By Congreſs,

John Jay — PRESIDENT.

Thirteen years before John Jay became Chief Justice of the United States he had served as President of the Continental Congress, his position therefore analogous to that of the President of the United States today. This interesting historical exhibit was loaned to the JOURNAL *through the kindness of Oliver R. Barrett of the Chicago Bar.*



TROUBLED WATERS lie beyond the quiet horizon of every business venture. The hazards of industry make peculiar warfare that is never declared, never expected. Weapons like employee dishonesty, burglary, forgery and liability engage assets in deadly combat. But like ships with sealed orders, insurance policies and bonds of American Surety and New York Casualty Companies safeguard assets for insured owners. In this way clients *lose their loss* to these strong companies.

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NATIONAL DEFENSE IN INDIANA

By THOMAS C. BATCHELOR

Secretary, Indiana State Bar Association

WITH a meeting program devoted to National Defense and the emergency confronting America, it is appropriate that the American Bar Association should meet this year in a state which is the very center of the effort being made to produce the materials necessary for the protection of this country and its institutions.

Indiana, until just a short time ago a happily balanced agricultural and industrial state, has almost overnight taken its place as a leader in the production of munitions and war material. Huge areas of the state have been taken over by the government for military purposes, and immense plants are in operation or in process of construction from the Ohio River to Lake Michigan.

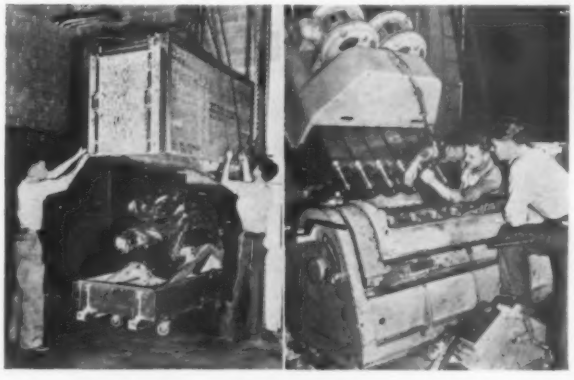
James Whitcomb Riley Home, Indianapolis

It almost staggers the imagination to realize that here, almost a thousand miles from the ocean, the great Atlantic fleet will be serviced, yet such is the case. On a 60,000 acre tract of ground near Burns City, Indiana, the Navy is feverishly rushing to completion its Atlantic fleet ammunition depot. Here will be stored in unbelievable quantities powder and high explosives and other naval munitions, and manufacturing units will turn out a steady stream of star shells and navy parachutes.

Not far from Burns City, at Charlestown, is the huge Du Pont powder plant. This plant is already in operation and employing approximately 18,000 men. Close by the Navy has acquired a vast area comprising parts of three counties, on which it is establishing proving grounds where enormous guns will fire shells a distance of twenty miles in testing operations.

In Indianapolis the famous Allison liquid-cooled airplane engine is being produced in ever-increasing quantities, and these powerful motors may be the determining factor in the great battle for air supremacy. Another Indianapolis contribution to aircraft production will be the Curtiss-Wright propeller factory, shortly to start production. Additional defense projects hastening to completion in Indianapolis are a $12,000,000 cartridge plant of the Bridgeport Brass Company and a $6,000,000 Naval Ordnance bomb-sight factory.

In South Bend the need for planes and more planes is being met by the Studebaker Corporation and the Bendix Aviation Corporation, which have defense orders totalling more than $100,000,000. Also in the northern part of the state, in LaPorte County, there has been constructed a $38,000,000 shell loading plant known as the Kingsbury Ordnance Project.



Power for the Wings of Defense

While the factories of Indiana are making this contribution to National Defense and turning out government orders totalling more than $500,000,000.00, the actual training for warfare goes on at Fort Benjamin Harrison, located a few miles northeast of Indianapolis. Uniformed soldiers from this famous post will be a familiar sight on the streets of the city during the Association meeting.

PROGRAM

64th ANNUAL MEETING OF THE

AMERICAN BAR ASSOCIATION

September 29 to October 3, 1941

THE ASSEMBLY

Monday, September 29, 1941. 10:00 A.M.

Murat Theatre

FIRST SESSION

Call to Order, by the President

THE CHAIRMAN OF THE HOUSE OF DELEGATES, presiding

Address of welcome, by Mr. Albert Harvey Cole, Indiana

Response to welcome by Honorable Forrest C. Donnell, The Governor of Missouri

Annual Address of the President of the Association

THE PRESIDENT, presiding

Statement concerning work of the American Law Institute, by Honorable George Wharton Pepper, President of the Institute

Opportunity for offering of resolutions, pursuant to Article IV, Section 2 of the Constitution

Announcement by the Secretary of vacancies, if any, in the offices of State Delegates and Assembly Delegates

Nomination and election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with adjournment of 1943 Annual Meeting*

Wednesday, October 1, 1941. 9:30 A.M.

Auditorium, World War Memorial

SECOND SESSION

THE PRESIDENT, presiding

Election (by ballot) of four Assembly Delegates for two-year term ending at the close of the 1943 Annual Meeting.*

SYMPOSIUM ON HEMISPHERIC SOLIDARITY

Under auspices of the Section of International and Comparative Law

JOHN T. VANCE, Chairman, presiding

Address by Dr. Enrique Gil, vice-president of the Bar Association of Buenos Aires, Argentina, and Vice-President of the Inter-American Bar Association

Address by Honorable Tom Connally, Chairman, Committee on Foreign Relations, United States Senate

8:30 P.M.

Murat Theatre

THIRD SESSION

THE PRESIDENT, presiding

Address by the Honorable Robert H. Jackson, Associate Justice, Supreme Court of the United States

Address by Sir Norman Birkett, K. C., of the English Bar.

10:00 P.M.

Reception by the President of the Association to members and guests. Dancing. Refreshments.

Thursday, October 2, 1941. 9:30 A.M.

Murat Theatre

FOURTH SESSION

THE PRESIDENT, presiding

Presentation of award of merit to a state bar association and a local bar association.

Presentation of prize award for 1941 Ross Bequest Essay to Willard Bunce Cowles, of Washington, D. C.

Open Forum—Report of Resolutions Committee, Hatton W. Sumners, Chairman.

Report by Chairman of the House of Delegates (or the Secretary) as to matters requiring action by the Assembly

Amendments of Constitution and By-Laws

7:30 P.M.

ANNUAL DINNER

THE PRESIDENT, presiding

Presentation of the American Bar Association Medal.

Speakers to be announced later.

Friday, October 3, 1941. 12:30 P.M.

Riley Room, Claypool Hotel

Luncheon

THE PRESIDENT, presiding

Presentation of incoming officers

Remarks by the incoming President

(immediately following luncheon)

FIFTH SESSION

Report by the Chairman of the House of Delegates of the action of the House upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Adjournment

*Note: At the midyear meeting of the House of Delegates held in Chicago March 17, 1941, the Committee on Rules and Calendar recommended that the election of Assembly Delegates for the regular term be scheduled for a session subsequent to that at which nominations are made.

THE HOUSE OF DELEGATES

Assembly Room, Claypool Hotel

Monday, September 29, 1941. 2:00 P.M.

FIRST SESSION

THE PRESIDENT, presiding

Roll Call
Report of Committee on Credentials and Admissions, Morris B. Mitchell, Chairman, Minnesota
Approval of the Record
Statement of the Chairman of the House of Delegates
Report of the Treasurer, John H. Voorhees, South Dakota
Report of the Chairman of the Budget Committee, Carl B. Rix, Wisconsin
Report of the Board of Governors to the House of Delegates, Harry S. Knight, Secretary, Pennsylvania
Report of the Committee on Rules and Calendar (including proposed amendments to Constitution and By-Laws) Chauncey E. Wheeler, Chairman, Rhode Island
Election of Members of the Board of Governors, as prescribed by the Constitution, Article VIII, Section 3
Offering of resolutions for reference to the Committee on Draft

Reports of Committees

National Defense, Edmund Ruffin Beckwith, Chairman, New York
Advancement and Coordination of National Defense, Thomas D. Thacher, Chairman, New York
Improving the Administration of Justice, John J. Parker, Chairman, North Carolina
American Citizenship, Joseph P. Gaffney, Chairman, Pennsylvania
Bill of Rights, George I. Haight, Chairman, Illinois
Ways and Means, Howard L. Barkdull, Chairman, Ohio
Jurisprudence and Law Reform, Walter P. Armstrong, Chairman, Tennessee
Administrative Law, O. R. McGuire, Chairman, Washington, D. C.
Labor, Employment and Social Security, William L. Ransom, Chairman, New York
Economic Condition of the Bar, John Kirkland Clark, Chairman, New York
Customs Law, Albert MacC. Barnes, Chairman, New York
Securities Laws and Regulations, Talcott M. Banks, Jr., Chairman, Massachusetts

Wednesday, October 1, 1941. 2:00 P.M.

SECOND SESSION

THE CHAIRMAN, presiding

Roll Call
Reading and approval of the Record
Unfinished business

Reports of Committees

Admiralty and Maritime Law, Cody Fowler, Chairman, Florida
Aeronautical Law, Mabel Walker Willebrandt, Chairman, Washington, D. C.
(a) Joint report with Committee on Admiralty and Maritime Law and Section of International and Comparative Law relative to Aviation Salvage at Sea
(b) Joint report with Section of International and Comparative Law relative to organization of a permanent American Aeronautical Commission
Legal Aid Work, Harrison Tweed, Chairman, New York
Legal Service Bureaus, Kenneth Teasdale, Chairman, Missouri
Judicial Salaries, Walter S. Foster, Chairman, Michigan
Judicial Selection and Tenure, John Perry Wood, Chairman, California
Cooperation between Press, Radio and Bar, Giles J. Patterson, Chairman, Florida
Public Relations, Raymer F. Maguire, Chairman, Florida
Professional Ethics and Grievances, Orie L. Phillips, Chairman, Colorado
Unauthorized Practice of the Law, Edwin M. Otterbourg, Chairman, New York
Law Lists, Stanley B. Houck, Chairman, Minnesota

Reports of Sections

International and Comparative Law, John T. Vance, Chairman, Washington, D. C.
Bar Organization Activities, Burt J. Thompson, Chairman, Iowa
Junior Bar Conference, Lewis F. Powell, Jr., Chairman, Virginia
Legal Education and Admissions to the Bar, W. E. Stanley, Chairman, Kansas
Public Utility Law, George Dandridge Gibson, Chairman, Virginia

Thursday, October 2, 1941. 2:00 P.M.

THIRD SESSION

THE CHAIRMAN, presiding

Roll Call
Reading and approval of the Record
Unfinished business
Report to the House of Delegates of resolutions adopted by the Assembly for action by the House of Delegates
Consideration of Assembly resolutions

Reports of Committees

Commerce, Oscar C. Hull, Chairman, Michigan
Communications, Robert N. Miller, Chairman, Washington, D. C.

Facilities of the Law Library of Congress, Charles H. Leavy, Chairman, Washington
State Legislation, Fred T. Hanson, Acting Chairman, Nebraska
Printing, Publication and Indexing, William L. Ransom, Chairman, New York

Reports of Sections

National Conference of Commissioners on Uniform State Laws, William A. Schnader, President, Pennsylvania
Criminal Law, James J. Robinson, Chairman, Indiana
Judicial Administration, James W. McClendon, Chairman, Texas
Mineral Law, Alvin Richards, Chairman, Oklahoma
Patent, Trade-Mark and Copyright Law, Loyd H. Sutton, Chairman, Washington, D. C.
Insurance Law, Howard C. Spencer, Chairman, New York
Municipal Law, William C. Chanler, Chairman, New York
Real Property, Probate and Trust Law, Harold L. Reeve, Chairman, Illinois
Commercial Law, John M. Niehaus, Jr., Chairman, Illinois
Presentation of any matters which any state or local bar association or any affiliated organization of the legal profession wishes to bring before the House of Delegates
Presentation of any matters which any Section or standing or special committee of the Association wishes to bring before the House of Delegates
Report of the Board of Elections, Edward T. Fairchild, Chairman, Wisconsin

Reports of House Committees

Draft, John Kirkland Clark, Chairman, New York Hearings
Credentials and Admissions, Morris B. Mitchell, Chairman, Minnesota
Unfinished business
New business

THE PRESIDENT in the Chair

Statement of certification of nominations for officers, Harry S. Knight, Secretary, Pennsylvania
Election of officers
Presentation of incoming Chairman of House of Delegates

Friday, October 3, 1941. 9:30 A.M.

FOURTH SESSION

THE CHAIRMAN, presiding

Roll Call
Reading and approval of the record
Unfinished business

Reports of Sections

Taxation, George Maurice Morris, Chairman, Washington, D. C.

SECTIONS*

SECTION OF COMMERCIAL LAW

Monday, September 29. 2:00 P.M.

Palm Room, Claypool Hotel

Joint meeting with Sections of Municipal Law and Taxation

ROBERT A. B. COOK, presiding

Round Table discussion of "State and Municipal Sales and Use Taxation"

Discussion leaders:

For the Section of Commercial Law, Randolph Paul, New York City

For the Section of Municipal Law, Robert C. Brown, Bloomington, Indiana

For the Section of Taxation, Richard Capel Beckett, Chicago, Illinois

Tuesday, September 30. 10:00 A.M.

Bamboo Room, Washington Hotel

JOHN M. NIEHAUS, JR., Chairman, presiding

Minutes of last meeting, J. Kemp Bartlett, Jr., Secretary
Report of the Chairman, John M. Niehaus, Jr.
"Conditional Sales Contracts and recent legislation relative thereto," address by Joseph Myerson, New York City, Chairman, Committee on Conditional Sales and Chattel Mortgages
General discussion
"Recent developments in the law of Reorganizations" Discussion and open forum led by John Gerdes, New York City, Chairman, Committee on Reorganizations

LUNCHEON

12:30 P.M.

Ball Room, Columbia Club

(Jointly with Section of Taxation and Section of Municipal Law)

GEORGE M. MORRIS, presiding

"Tax Thoughts of a Governor" by Honorable John W. Bricker, Governor of the State of Ohio

*The programs of the following Sections were omitted from the August JOURNAL because of insufficient space. For other section programs see page 515 et seq of the August issue.

2:00 P.M.

Bamboo Room, Washington Hotel

JOHN M. NIEHAUS, JR., Chairman, presiding

"Suggested improvements in the law of Negotiable Instruments." Discussion led by Charles B. Dunn, Chicago, Illinois, Chairman, Committee on Negotiable Instruments

Topic: Recent Developments in Bankruptcy and Liquidations

Discussion led by Paul King, Detroit, Michigan, Chairman, Committee on Bankruptcy and Liquidation
"Recent Decisions under the Chandler Act"
"New Bankruptcy Administration Act (H.R. 4394)"
General Discussion and Open Forum

Report of Committee on State Court Receiverships, by Reuben Hunt, Los Angeles, California, Chairman
General discussion and open forum

Nominations and election of officers and members of the council

Installation of new officers

Adjournment

SECTION OF CRIMINAL LAW

Rainbow Room, Severin Hotel

Tuesday, September 30. 10:00 A.M.

PAUL E. LOCKWOOD, Executive Assistant to District Attorney Dewey, New York City, presiding

Subject: Recommendations of Principles and Provisions for Federal Court Rules of Criminal Procedure.

"What the United States Attorneys Recommend," by Honorable Douglas W. McGregor, United States Attorney, Southern District of Texas, Chairman of the Committee of the National Association of United States Attorneys to cooperate with the Advisory Committee on Federal Rules, Houston, Texas

"What Counsel for the Defense Recommend," by Honorable Floyd E. Thompson, of the Chicago Bar, former judge of the Supreme Court of Illinois

"The Federal Trial Judge Sums Up," by Honorable Robert C. Baltzell, Judge of the United States District Court, Southern District of Indiana, Indianapolis

Tuesday, September 30. 2:00 P.M.

JAMES J. ROBINSON, Chairman of the Section, presiding

Subject: Strengthening State Police Systems for National Defense in Peace and in War by Adequate Legislation

"The State Police and National Defense," by Honorable Henry F. Schricker, Governor of Indiana

Report of the Committee on Police Training and Merit Systems, John R. Snively, Rockford, Illinois, Chairman

"The Principal Legislative Needs of the State Police," by Dr. David G. Monroe, Director of Research and Information, Northwestern University Traffic Institute

Panel Discussion, "Preparation of a Model State Police Act"

Newman F. Baker, Professor of Law, Northwestern University

Franklin M. Kreml, Director, Northwestern University Traffic Institute and the International Association of Chiefs of Police, Safety Division

Donald S. Leonard, Captain, Michigan State Police

Bruce Smith, Member of Staff of Institute of Public Administration, New York City

O. W. Wilson, Professor of Police Administration, University of California, Berkeley, California

Wednesday, October 1. 2:00 P.M.

HONORABLE EARL WARREN, Attorney General of California, presiding

Message to the Section of Criminal Law from the Attorney General of the United States

Introduction by Gordon E. Dean, Washington, D. C.

"The Enforcement of Federal Criminal Laws Relating to National Defense," by Honorable Wendell Berge, Assistant Attorney General in charge of the Criminal Division, Department of Justice, Washington, D. C.

Reports of Committees:

Magistrates and Traffic Courts, Judge Louis B. Ewbank, Indianapolis, Chairman: "The Drafting of a Model Bill for a Local Magistrate's System"

Sentencing, Probation, Prisons and Parole, Dean Wayne L. Morse, Eugene, Oregon, Chairman: "The Proposed Federal Indeterminate Sentence Law"

Federal Election Laws, Arthur J. Freund, St. Louis, Missouri, Chairman

Coordination of Law Enforcement Agencies, Honorable Earl Warren, San Francisco, California, Chairman

Education and Practice, Paul H. Sanders, Durham, North Carolina, Acting Chairman

Rating Standards and Statistics, Honorable Dan W. Jackson, Houston, Texas, Chairman

Report of the Chairman

Report of the Secretary

Completion of unfinished business

Meeting of the Council

Breakfast Conferences at 8:30 a.m. on Tuesday, September 30 and on Wednesday, October 1, will be held by the officers, council members and chairmen of committees of Section, at a place to be announced

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

FIFTY-FIRST ANNUAL MEETING,

SEPTEMBER 22-27, 1941

Travertine Room, Hotel Lincoln

Monday, September 22

The morning and also the evening will be devoted to meetings of Sections and Committees for the consideration of their work and their reports and the further consideration of their tentative drafts of Acts to be presented. It is expected that such meetings will be at 10:00 o'clock A.M., and 8:00 o'clock P.M., respectively, or as soon thereafter as possible

2:00 P.M.

FIRST SESSION

Address of Welcome
Response
Roll Call
Reading of Minutes of Last Annual Meeting
Announcement of Appointment of Nominating Committee
Address of President, William A. Schnader
Report of Treasurer, Murray M. Shoemaker
Report of Secretary, Barton H. Kuhns
Report of Executive Committee, John Carlisle Pryor, Chairman
Reports of Standing Committees:

1. Public Information, James Thomas Connor, Chairman
2. Appointments of and Attendance by Commissioners, Barton H. Kuhns, Chairman
3. Style, E. E. Brossard, Chairman

Reports of General Committees:

1. Legislative Drafting, Charles H. Queary, Chairman
2. Compacts and Agreements Between States, Robert S. Stevens, Chairman

Reports of Special Committees:

1. Committee on Cooperation with the Interstate Commission on Crime, Robert K. Bell, Chairman
2. Committee on Cooperation with the Federal-State Conference on Law Enforcement Problems of National Defense, James C. Wilkes, Chairman

Reports of Sections:

1. Commercial Acts Section, Karl N. Llewellyn, Chairman
2. Property Acts Section, George G. Bogert, Chairman
3. Public Law Acts Section, John P. Deering, Chairman
4. Social Welfare Acts Section, Sidney Clifford, Chairman
5. Corporation Acts Section, W. E. Stanley, Chairman
6. Torts and Criminal Law Acts Section, Albert J. Harno, Chairman
7. Civil Procedure Acts Section, Frank M. Clevenger, Chairman

Reports of Section Committees and Special Committees assigned to Sections except Reports appearing on program at subsequent Sessions

8:00 P.M.

Section and Committee Meetings

Tuesday, September 23. 9:30 A.M.

SECOND SESSION

Deferred Section and Committee Reports
Consideration of Uniform Act on Survival of Tort Actions and Death by Wrongful Act, Paul Brosman, Chairman

2:00 P.M.

THIRD SESSION

Consideration of Model Vital Statistics Act, James C. Wilkes, Chairman
Consideration of Uniform State Business Codes Act, Frank E. Horack, Jr., Chairman

Wednesday, September 24. 9:30 A.M.

FOURTH SESSION

Report of Nominating Committee and Election of Officers
Consideration of Uniform Bank Collection Act, Sterry R. Waterman, Chairman
Consideration of Report of Special Committee on Transfers of Stock by Fiduciaries, Ralph F. Fuchs, Chairman

2:00 P.M.

FIFTH SESSION

Consideration of Revised Uniform Sales Act, Karl N. Llewellyn, Chairman
Consideration of Amendments to Uniform Negotiable Instruments Act, Charles R. Hardin, Chairman

Thursday, September 25. 9:30 A.M.

SIXTH SESSION

Consideration of Uniform Act on Statutory Construction, William R. Shands, Chairman
Consideration of Uniform Criminal Statistics Act, C. Walter Cole, Chairman

2:00 P.M.

SEVENTH SESSION

Consideration of Reports of the following Committees:

Legislative Committee, Fred T. Hanson, Chairman

Committee on Cooperation with the Council of State Governments and the American Legislators Association, George G. Bogert, Chairman

Committee on Uniformity of Judicial Decisions, Donald E. Bridgman, Chairman

Committee on Obsolete Acts, Frank E. Horack, Jr., Chairman

Friday, September 26. 9:30 A.M.

EIGHTH SESSION

Consideration of Report of Section Committee on Uniform Contribution Among Tortfeasors Act, Albert J. Harno, Chairman

Consideration of Report of Special Committee on Ancillary Administration of Estates Act, Jesse E. Marshall, Chairman

2:00 P.M.

NINTH SESSION

Consideration of Report of Special Committee on Double Taxation of Intangibles, Henry S. Fraser, Chairman

Consideration of Report of Special Committee on Uniform Aeronautical Code, Robert T. Barton, Jr., Chairman

4:30 P.M.

Memorials

Saturday, September 27. 9:30 A.M.

TENTH SESSION

Consideration of Deferred Uniform Acts

Consideration of First Tentative Drafts of Other Proposed New Uniform Acts

Unfinished Business

New Business

Adjournment

If necessary to complete the work of the Conference an additional session will be held Saturday afternoon, and the program will be supplemented by such evening sessions as are required.

FOREIGN VISITORS AT INDIANAPOLIS

Sir Norman Birkett, K.C.

Sir Norman Birkett, K.C., who speaks at the evening session of the Assembly at the Indianapolis meeting as the representative of the British Bar, is one of the most illustrious of present-day English lawyers. He was born in Lancashire, England, in 1883 and received his degree from Cambridge University. He was called to the Bar, Inner Temple, in 1913, and appointed King's Counsel in 1924. He was elected to Parliament 1923-24 and again in 1929-31. During recent years he has been retained in some of the most outstanding cases in England and was knighted in June, 1941.

Hon. D. L. McCarthy, K.C.

D'Alton L. McCarthy, K.C., President of the Canadian Bar Association, is to be the representative of the Canadian Bar at the Annual Meeting. He is well remembered by those who saw him and met him at the Philadelphia meeting last year. He was born in 1870, called to the Bar of Ontario in 1895, and created King's Counsel in 1908. He was formerly an officer in the Governor General's Body Guards and Major and Officer commanding the 9th Toronto Light Horse. He will speak at the dinner to be given by the Section of Judicial Administration.

OTHER ORGANIZATIONS

CONFERENCE ON PERSONAL FINANCE LAW

Monday, September 29. 6:30 P.M.

Parlor B, Claypool Hotel

FIFTEENTH ANNUAL MEETING

EDMUND RUFFIN BECKWITH, Chairman, presiding

INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (American Group)

Parlors D and E, Indianapolis Athletic Club

Tuesday, September 30. 12:30 P.M.

ANNUAL LUNCHEON MEETING

JOHN A. DIENNER, President, presiding

Reports of Officers and Committees
General Discussion by members
Election of Officers

INDIANA STATE BAR ASSOCIATION

Tuesday, September 30. 2:00 P.M.

Palm Room, Claypool Hotel

ANNUAL MEETING

HON. ROSCOE C. O'BYRNE, President, presiding

THE NATIONAL CONFERENCE OF BAR EXAMINERS

Tuesday, September 30. 9:30 A.M.

Dining Room 1, Columbia Club

STANLEY T. WALLBANK, Chairman, presiding

Speakers to be announced later

12:30 P.M.

LUNCHEON

Harrison Room, Columbia Club

Speaker to be announced

2:00 P.M.

Auditorium, World War Memorial

Joint meeting with Section of Legal Education and Admissions to the Bar

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MEETINGS OF LAW SCHOOL ALUMNI ASSOCIATIONS, LEGAL FRATERNITIES, SORORITIES AND OTHER ORGANIZATIONS

THE following Law School Alumni Associations, Legal Fraternities, Sororities and other groups will hold breakfast, luncheon and dinner meetings during the Annual Meeting of the American Bar Association, in Indianapolis. Tickets may be purchased and information secured at the GENERAL HEADQUARTERS, CLAYPOOL HOTEL.

The University of Chicago Law School Alumni, Luncheon, Wednesday, October 1, Columbia Club.

Columbia University Law School Alumni, Luncheon, Wednesday, October 1, Claypool Hotel.

Cornell University Law School Alumni, Luncheon, Wednesday, October 1, Lincoln Hotel.

Delta Theta Phi Law Fraternity, Luncheon, Thursday, October 2, Washington Hotel.

Bar Association of the District of Columbia, Dinner, Tuesday, September 30, Lincoln Hotel.

Georgetown University Law School Alumni, Luncheon, Wednesday, October 1, Washington Hotel.

The George Washington Law Association, Luncheon, Wednesday, October 1, Washington Hotel.

Harvard University Law School Alumni, Luncheon, Thursday, October 2, Claypool Hotel.

University of Illinois, Luncheon, Wednesday, October 1, Severin Hotel.

Indiana University Law School Alumni Association, Dinner, Monday, September 29, Columbia Club.

Kappa Beta Pi Legal Sorority, Breakfast, Wednesday, October 1, Columbia Club. Reservations should be made with Mrs. Jean Smith Evans, Chairman of Committee on Arrangements, 1553 No. Clark St., Chicago, Ill.

University of Maryland Law School Alumni, Luncheon, Wednesday, October 1, Lincoln Hotel.

University of Michigan Law School Alumni, Luncheon, Wednesday, October 1, Lincoln Hotel.

National University Law School Alumni, Luncheon, Wednesday, October 1, Severin Hotel.

Phi Alpha Delta Law Fraternity, Luncheon, Thursday, October 2, Columbia Club.

Phi Delta Delta Legal Fraternity, Breakfast, Wednesday, October 1, Lincoln Hotel.

Phi Delta Phi Legal Fraternity, Dinner, Wednesday, October 1, Claypool Hotel.

Sigma Delta Kappa Alumni Association, Luncheon, Wednesday, October 1, Indianapolis Athletic Club.

The Texas Society, Luncheon, Tuesday, September 30, Lincoln Hotel.

University of Virginia Law School Alumni, Luncheon, Wednesday, October 1, Claypool Hotel.

Yale University Law School Alumni, Luncheon, Wednesday, October 1, Columbia Club.

JUNIOR BAR NOTES

UPON completing plans for the eighth annual meeting of the Junior Bar Conference to be held in Indianapolis, National Chairman Lewis F. Powell, Jr., Richmond, Va., began to take steps for streamlining the appointive process. His object is to avoid the delay which has been involved in securing capable men and women to fill the key positions in the Conference machinery. Necessity has focused attention on this problem because of the anticipated increase in the number of persons who will be unavailable because they will be engaged in National Defense efforts during the coming year. The Executive Council has therefore authorized him to continue in office for another term, all public information directors who have performed creditably during the past year. The continuity achieved by using this experienced group should increase the effectiveness of the program.

Annual Meeting

The Program Committee has secured three excellent speakers for the business sessions of the Conference. The address of welcome is scheduled to be given by Honorable James M. Tucker, Secretary of State for Indiana. Although he is the youngest person ever elected to this office, he has already established an enviable reputation as a speaker. His fiery delivery, humorous anecdotes, and colorful language should be well received.

The principal address at the first business session will be given by General Allen W. Gullion, Judge Advocate General of the United States Army. Every member of the Junior Bar Conference is interested in the work of this important branch of the Army, and it is deemed a distinct honor to be able to secure General Gullion.

The other important speaker is R. D. Guy, Jr., a young Canadian lawyer who has already risen to an important rank in the legal profession. He is Secretary of the Manitoba Council of the Canadian Bar Association and Vice-Chairman of the Junior Board of Trade of Winnipeg.

Information received from the Arrangements Committee indicate that there will be a high order of entertainment for the members of the Junior Bar Conference and their ladies. A special effort is being made to make this one of the most pleasant meetings ever staged by the Conference.

Lewis F. Powell, Jr.
Chairman, Junior Bar Conference

Public Information Program

The growing importance of the Public Information Program has prompted the officers to schedule an additional meeting at Indianapolis for the benefit of state and local directors and state chairmen. This will be a "How" session depicting effective ways to conduct a local program. A great deal of benefit will be derived from this session as it is calculated to close the gap between the printed library material that has been sent to the directors and the actual staging of speeches, radio talks, round table discussions, and other ways of disseminating information.

The OPM, Radio Division, has prepared and distributed to all state and local directors additional scripts on the subjects: "Priorities," "Housing," and "Our Way of Life." Robert O. Horton, Director of Information for OPM, has indicated that he is satisfied with the services being rendered by the Conference.

Membership

The Membership Committee under the leadership of Willett N. Gorham, Chicago, Ill., has had a difficult time during the past year. Every member of the Conference is urged to make a special effort to assist his Committee by securing at least one additional new member between now and the Annual Meeting. A personal solicitation is the best approach.

Ohio Members Honored

James Arthur Gleason, Cleveland, Council member from the Sixth Circuit, and E. Clark Morrow, Ohio State Chairman, Newark, were recently honored by the publication of their biographies in the American Law and Lawyers. They were selected as two of the younger members of the Ohio Bar who were destined to become the future leaders of the profession. Mr. Gleason is the second member of the Council to receive his orders to report for military duty.

Alvah T. Martin, Chairman of the Younger Members Committee of the Chicago Bar Association, recently announced that active steps were being taken to study Group Insurance Plans for Lawyers. Since there is considerable national interest in this subject, Chairman Powell has requested this committee to make the survey a joint project with the Conference.

New officers elected for the Junior Bar Section of the Hennepin County Bar Association are Chairman Juels Hannaford, III, Vice-Chairman Wells Wright, and Secretary Fred Thomas, all of Minneapolis. James Otis, Jr., St. Paul, is Chairman of the Intermediate Section of the Ramsay County Bar Association, its Twin City counterpart.

Fred Korth of Fort Worth, Texas, was recently elected Chairman of the State Junior Bar of Texas.

By JAMES P. ECONOMOS
Secretary, Junior Bar Conference

PRESS COMMENT

BOMBING OUR HERITAGE

An Editorial by the Chicago Daily News, August 13, 1941

EXCEPT for literature, the closest approach to a common mentality of the American and English peoples is to be found in jurisprudence. In business, we have been more competitive than co-operative. Tatnall's heroic slogan "blood is thicker than water" was swell for a rescue party of American sailors putting off to save a bunch of British tars, but the biological differentiation of the English-descended American stock from the stock left behind is one of the sharpest that ever happened, and few factors are more potent in the evolution of new varieties than the opposed forces of emigration and segregation.

But with their laws identical with English law to 1607, and running in interconnected streams ever since, Americans are never closer to England than when they are in the courthouse. And so nothing can more forcibly elucidate how and why the Hitler assault upon the island of Britain is an attack that excites profound aversion and hatred in the deeper consciousness of Americans; than the story of the destruction of nearly all the historic buildings associated with our basic ideals of law and justice.

In the current "London Letter" in the American Bar Association Journal, American lawyers are given an account of the destruction wrought by the bomber vandals upon structures that are an integral part of the tradition of both English and American law. We venture to guess that the perusal of this story elicited not a little ingrowing and outspoken profanity in law offices all over this country.

It outrages every American mind attuned to the glorious tradition of the common law, and it is no less an outrage upon the consciousness of every man who ever read a Dickens novel. The British censor, incidentally, either does not bear down on the American Bar Association Journal or else the whole silly business of "hush hush" must have been dropped recently.

Here are a few sample lead sentences in the catalogue of ruin given in the legal magazine: "Perhaps one should place first on the list the tragedy of the Temple Church which has been entirely gutted by fire"; "The Master's House. This house, which was partly demolished in an earlier raid, has now been entirely destroyed"; "The Cloisters, built in 1681 in accordance with plans prepared by Sir Christopher Wren, have also been destroyed by fire"; "Lamb Building is now nothing but a heap of burnt-out ruins"; "Mitre Court buildings, at the top of King's Bench Walk, which had already been partly demolished in an earlier raid, have been burnt out, as has No. 1 King's Bench Walk."

And so on and on runs the tale of tyrants' bombs rained on the haunts of freemen's justice. Anything left? Yes—freemen are left, and so long as any walk the earth, the common law will not lack disciples.

CHIEF JUSTICE

The July number of the AMERICAN BAR ASSOCIATION JOURNAL presents a group of articles about the career and achievements of Charles Evans Hughes, who on July first retired from active service on the bench after more than eleven years as Chief Justice of the United States. The new Chief Justice, Harlan F. Stone, sums up a tribute to the high qualities of his predecessor in the following words—

> In his relations with his colleagues he has been friendly to all, but partial to none. No differences of opinion have been allowed to disturb that fortunate relationship. He has provoked no resentments and has cherished none. As Chief Justice he has thought of himself as the titular leader among equals, and of the institution itself as greater than the individuals who happen for the moment to represent it. Jealous of the dignity and prestige of the Court he has been constantly aware that these will not endure without the single-minded devotion of its members to the faithful performance of the high duty committed to it by the Constitution. To that end he has given unsparingly of his great strength and exceptional talents. Now, as he lays down the burden, his colleagues unite with all his countrymen in recognition of a public service whose duties he has so wisely comprehended and so ably performed. It is the fitting climax of a long life of high endeavor and distinguished achievement in which every citizen of the United States may justly take pride.

To lawyers and laymen alike Chief Justice Hughes has been a symbol of supreme judicial ability and integrity, and it is certain that Chief Justice Stone will occupy the same high place in the life of the Court and in the opinion of the American public.

From the Chicago Bar Association Record, July 1941

(Continued from page 551)

Legal Miscellanies: Six Decades of Changes and Progress, by Henry W. Taft. 1941. New York: The MacMillan Company. Pp. XIII, 218.—All Mr. Taft's many friends and acquaintances scattered over this country from Dan to Beersheba, and any other lawyers to whose attention this little book may be drawn, will derive great pleasure from perusing its interesting pages.

The first chapter sets out with evident pride Mr. Taft's excellent New England background (although he was born in Cincinnati) and touches a responsive chord even in Americans who pride themselves as fully on a much more Southerly family origin than New England; for the American gentry of a hundred and twenty-five years ago were very much alike in their sturdy virtues and their sense of obligation to the duties of life. He then portrays vividly the difficulties, discouragements, and struggles of a young lawyer, just out of college and law school, to master the intricacies of legal practice in the courts of that day in New York, where at the beginning of his practicing years he chose to cast his lot. He tells modestly his triumphs along the way to the top rung of the New York City bar, where he has successfully maintained himself, both as a *nisi prius* and as an appellate barrister, for some fifty years at least.

He then recounts the progress of the many efforts of the bar during his long experience to accomplish procedural and legal reforms; in most of which he took active part himself; and he explains the history and social demand for much of the legislation, both state and national, which has so affected the practice of the law during the last fifty years.

His explanation of the need for the Sherman Anti-trust Law, and his analysis of the application and development of that law, should be read carefully by every American lawyer. While thoroughly critical of it, his analysis is impartial and just, and nowhere reveals that he was so often the adviser of corporate organizations whose plans or business aims were checked by its provisions.

BOOKS RECEIVED

THE MYSTERIOUS SCIENCE OF THE LAW: An Essay on Blackstone's "Commentaries" showing how Blackstone, employing Eighteenth-Century ideas of Science, Religion, History, Aesthetics, and Philosophy, made of the Law at once a Conservative and a Mysterious Science. By Daniel J. Boorstin. 1941. Cambridge: Harvard Univ. Press. Pp. xvii, 256. Price $3.00.

THE THEORY OF LEGAL SCIENCE, by Huntington Cairns. 1941. Chapel Hill: The Univ. of North Carolina Press. Pp. 155. Price $2.00.

THE LAW OF PICKETING IN PENNSYLVANIA: A Survey of the Law of Picketing from 1806 to 1941, by M. Herbert Syme. 1941. Philadelphia: Joseph M. Mitchell. Pp. 52. Price $1.50.

FEDERAL TAXATION FOR THE LAWYER, by Houstin Shockey. 1941. New York: Prentice Hall, Inc. Pp. 408. Price $5.00.

INDIAN AFFAIRS: LAWS AND TREATIES, by Charles J. Kappler. Vol. V (Laws) Compiled from December 22, 1927 to June 29, 1938. 1941. Washington: U. S. Government Printing Office.

A KALEIDOSCOPE OF JUSTICE: Authentic Accounts of Trial Scenes from all Times and Climes, by John H. Wigmore. 1941. Washington: Washington Law Book Company. Pp. 751. Price $6.00.

FEDERAL ADMINISTRATIVE PROCEEDINGS: The James Schouler Lectures in History and Political Science—Johns Hopkins University, by Walter Gellhorn. 1941. Baltimore: The Johns Hopkins Press. Pp. 150. Price $2.00.

In discussing the preparation for the practice of the profession, as would be expected, his many years of active practice seem to have made him unduly critical of the present plans of the leading law schools to broaden the base of the law student's education. He disapproves the effort to inject the study of economic and social sciences into a lawyer's preparation. He says, "Surely, in the practice of our profession, excursions into theoretical economics and sociology would not tend to produce eminent jurists, though it would increase the number of members of the bar choosing to call themselves 'liberals,' whatever that term means" (p. 105). But Mr. Taft seems to overlook the purpose of those excursions of the law student. Of course it is not hoped that the student by taking such courses for a few hours a semester would become familiar with "public control of business and public utilities, trade regulation, business cycles, general economic theory, theory of capital and interest, monetary theory," etc. Nor is it expected that by teaching him the origin of the original writs, and common law and equity pleading, as they were before the simplification of pleading, he can conduct alone a suit in a federal court under the new Rules of 1938, and obtain the final judgment which his case deserves. Mr. Taft's learning on the questions of corporate administration and the economic bearing of monetary laws has been gotten by a lifetime of study; and the purpose of the newer plans of the law schools seems to be merely to teach the young lawyer that there are fields of possible legal relations unthought of by the law student of sixty years ago. If the neophyte becomes too liberal, it is possibly the fault of the teachers rather than of the plan of teaching.

The little volume is full of interesting anecdotes which make each chapter pleasant reading but do not detract from the author's earnest desire, apparent throughout, to help his juniors to the highest conception of their duty to their profession, to society, and to truth.

HENRY UPSON SIMS.
Birmingham, Alabama.

The Utility of Logic in the Law

[*COMMON LAW pleading was very largely influenced by, and indeed patterned after, what the intellectual world has long known as Scholastic Logic. Among the early Greeks and Romans, Logic was largely originated by and long continued to be the special art of lawyers and orators. Aristotle wrote the first exhaustive treatise on Logic now extant and his book is studded with reference to the law and to the use of Logic in judicial proceedings.*

After the passing of the long intellectual reign of Scholastic Learning and of the so-called "Schoolmen," the pendulum swung the other way; and Logic came to be neglected, not only in the law but in all branches of education. Beginning about 1800 and continuing for nearly three-quarters of a century there was a sort of grand revival of the subject of Logic and a full recognition of its utility in all branches of learning. This revival was largely due to a famous treatise on Logic, first published about 1820, written by Richard Whately, who was for many years professor in Oxford University and later Archbishop of Dublin. Bishop Whately's treatise was in considerable measure responsible for a still more famous book—John Stuart Mill's System of Logic, *first published in 1843. Incidentally, Mill's treatise, which is now out of print and hard to get even at second-hand (except in libraries) has a close interest for lawyers, chiefly because of Mill's great familiarity with Political Science and governmental problems in general. Whately's book became the recognized textbook in all schools and colleges, not only of England but of America, for a full half century, and ran to at least twenty editions. In a revised American edition published in 1857, the author inserted a preface in which he discusses among other things* The Utility of Logic. *The following excerpt is worth reading. Ed.*]

"On the utility of Logic many writers have said much in which I cannot coincide, and which has tended to bring the study into unmerited disrepute. By representing Logic as furnishing the sole instrument for the *discovery of truth* in all subjects, and as teaching the use of the *intellectual faculties* in general they raised expectations which could not be realized and which naturally led to a reaction. * * *

If it were inquired what is to be regarded as the most appropriate intellectual occupation of MAN, *as* man, what would be the answer? The Statesman is engaged with political affairs; the Soldier with military; the Mathematician, with the properties of numbers and magnitudes; the Merchant, with commercial concerns, &c.; but in what are *all* and each of these employed?—employed, I mean, as *men;* for there are many modes of exercise of the faculties, mental as well as bodily, which are in great measure common to us with the lower animals. Evidently, in *Reasoning.* They are all occupied in deducing, well or ill, Conclusions from Premisses; each, concerning the subject of his own particular business. If, therefore, it be found that the process going on daily, in each of so many different minds, is, in any respect, the *same,* and if the principles on which it is conducted can be reduced to a regular system, and if rules can be deduced from that system, for the better conducting of the process, then, it can hardly be denied that such a system and such rules must be especially worthy the attention—not of the members of this or that profession merely, but—of every one who is desirous of possessing a cultivated mind. To understand the theory of that which is the appropriate intellectual occupation of Man in general, and to learn to do that *well,* which every one will and *must* do, whether well or ill, may surely be considered as an essential part of a liberal education."

Law Libraries and Law Books

THE JOURNAL is in receipt of the 1941 Year Book of the New York Law Institute which bears on its cover the slogan "The Oldest Law Library in New York City." The Librarian's Report contains among other things an interesting item as follows:

What Books Were Borrowed

This year, for the first time, we were able to report on the proportion of the various types of law books that were borrowed. Separate records of this information were not kept before this year.

These figures are important because, for the first time, they provide some concrete evidence as to what types of books lawyers seek from law libraries. More exactly, of course, they are a record of what books were borrowed from the Library of the New York Law Institute by the lawyers who were members.

The analysis of the circulation during the year follows:

Type of Books Loaned	*No. of Vols. Loaned*	*% of Total Circulation*
Reports of Decisions...	35,903	48%
[Official Reports, 26,866, 36%]		
[Reporter System, 9,036, 12%]		
Treatises (and Miscellaneous)	11,628	16%
Records and Briefs.....	10,970	15%
Statutes and Session Laws	9,500	13%
Law Reviews	6,548	8%
TOTAL FOR YEAR..	74,549	100%

Surveys in Conveyancing

By Professor Leonard F. Boon

Of the University of Minnesota

Nearly every lawyer is called upon from time to time to pass on the title to a house and lot which is being purchased by a client. Sometimes the lawyer passes on the title for himself. Or he may be passing on the title of a larger tract. Every lawyer has had experience with defective surveys. Accordingly, the following discussion clipped from the "Hennepin Lawyer," the Journal of the Minneapolis Bar Association, will be read with interest.—Ed.

The first thing an engineer [surveyor] wants is the description of the property as given in the deed. Writers have classified deed descriptions that are satisfactory to the legal profession, but some of these classes are not so satisfactory to the surveyor. He does not want to examine other documents (deeds, mortgages, etc.), that are to be found in various places; he wishes the description to be complete in itself. * * *

A favorite reflection cast on the work of the surveyor is the apparent disagreement in the measurement of the length of a line by several different men. There are many reasons for this and they may be classified under personnel, equipment, methods, and monuments. Many surveyors, particularly land surveyors, were poorly or inadequately trained. The rates of pay are still low and the poorer class of men drift into this field. * * * In many cases, the equipment used was old and worn, and never checked with standards for accuracy. This introduces further errors and discrepancies. Again, methods are used that are unsatisfactory. * * *

The question of adequate monuments is an old one, dating back as far as we have recorded history. We have been trying for more than five thousand years to find a type of land monument that would be indestructible and immovable, but we have failed just as they did in ancient Babylon and Egypt. Within the past few years another method for the location of monuments has been developed by the U. S. coast and geodetic survey, which use the values determined by them in the triangulation of the United States. These values for the triangulation stations are tied to the stars so that they are unchangeable, and these points can be replaced with mathematical accuracy. With this new system, new methods for land descriptions will be available that will enable the surveyor to do a better job at less expense. This system is now being established in Minneapolis. * * *

Such legislation has also been passed by New Jersey, Maryland and I believe other states.

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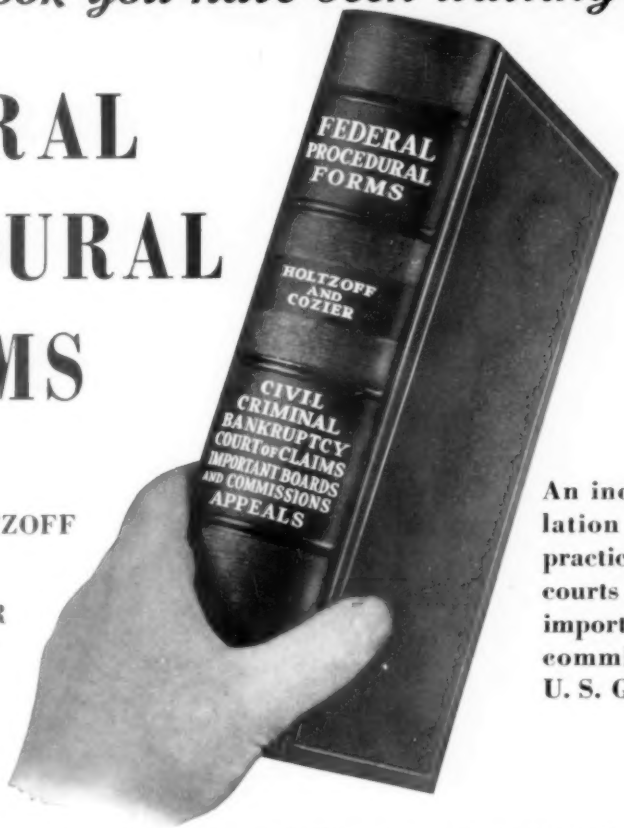

By ALEXANDER HOLTZOFF
Special Assistant to the Attorney General

and ALLEN R. COZIER
Special Attorney in the Department of Justice

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